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6  
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8 UNITED STATES DISTRICT COURT  
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
10

11 PROGRESSIVE WEST INSURANCE  
COMPANY, an Ohio corporation,

12 Plaintiffs,

13 v.  
14

15 BUN BUN TRAN, LEONEL  
ARRELLANO,

16 Defendants.  
17  
18

NO. 07- CV 1999 JAH (POR)

**DEFENDANT BUN TRAN'S  
REQUEST FOR JUDICIAL NOTICE  
IN SUPPORT OF HIS MOTION FOR  
SANCTIONS**

Time: 2:30 p.m.  
Date: June 16, 2008  
Ctrm.: 11  
940 Front Street  
San Diego, CA 92101

19 Defendant Bun Tran by and through his attorneys Angelo & Di Monda, LLP,  
20 hereby requests the Court to take judicial notice pursuant to Federal Rule of Evidence 201  
21 of the following documents contained within the Court's file on this matter. The  
22 existence and authenticity of said documents is not subject to reasonable dispute in that it  
23 is either (1) generally known within the territorial jurisdiction of the trial court or (2)  
24 capable of accurate and ready determination by resort to sources whose accuracy cannot  
25 reasonably be questioned.

26 Here all documents are contained in this Court's files.

- 27 1. Exhibit 1, attached hereto is a true and correct copy Tran's Motion to Dismiss for  
28 Lack of Federal Jurisdiction.

2. Exhibit 2, attached hereto is a true and correct copy Progressive's Opposition to Tran's Motion to Dismiss.
3. Exhibit 3, attached hereto is a true and correct copy of this Court's January 7, 2008 Order vacating oral arguments on Tran's Motion to Dismiss.
4. Exhibit 4, attached hereto is a true and correct copy of Progressive's Request to Enter Default against Arrellano in the Federal Action.
5. Exhibit 5, attached hereto is a true and correct copy of Tran's Motion to Set Aside Arrellano's Default.
6. Exhibit 6 attached hereto is a true and correct copy the Clerk of the U.S. District Court's Default against Arrellano.
7. Exhibit 7, attached hereto is a true and correct copy of Progressive Application for Default Judgment Against Arrellano.
8. Exhibit 8, attached hereto is a true and correct copy of this Court's Order dismissing Progressive's Federal Action for lack of diversity jurisdiction.

May 12, 2008

ANGELO & DI MONDA, LLP

By: S/Joseph Di Monda  
Christopher E. Angelo  
Joseph Di Monda  
Attorneys for Defendants,  
Bun Bun Tran and Le Thi Nguyen

# **EXHIBIT 1**

Christopher E. Angelo [70007]  
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Attorneys for Defendant Bun Bun Tran

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PROGRESSIVE WEST INSURANCE  
COMPANY, an Ohio corporation,

Plaintiffs,

v.

BUN BUN TRAN, LEONEL ARRELLANO,

Defendants.

NO. 07- CV 1999 JAH (POR)

**NOTICE OF MOTION AND  
MOTION TO DISMISS FOR LACK  
OF SUBJECT MATTER  
JURISDICTION; RULE 12(b)(1);  
DECLARATION OF JOSEPH DI  
MONDA, ESQ.**

Time: 2:30 p.m.  
Date: January 14, 2008  
Ct. No.: 11  
880 Front Street  
San Diego, CA 92101

**TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:**


**PLEASE TAKE NOTICE** that on January 14, 2008, or as soon thereafter as the matter may be heard in the above-entitled court, located at 880 Front Street, San Diego, CA 92101, defendant Bun Bun Tran, by and through his guardian ad litem Le Thi Nguyen, will move the court to dismiss the action pursuant to FRCP 12(b)(1) because plaintiff's complaint fails to state a cause of action on which relief can be granted because the court lacks subject matter jurisdiction.

The motion will be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Joseph Di Monda, Esq., and the

1 pleadings and papers filed herewith.

2  
3 Dated: November 27, 2007

ANGELO & DI MONDA, LLP

4  
5 By:   
6 Christopher E. Angelo  
7 Joseph Di Monda  
8 Attorneys for Defendants,  
9 Bun Bun Tran and Le Thi Nguyen  
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1 **I. INTRODUCTION**

2 BUN BUN TRAN ("TRAN") was catastrophically injured in an automobile accident  
3 ("the Accident") on November 18, 2006, in the City of San Diego. The vehicle which collided  
4 with TRAN was driven by defendant LEONAL ARRELLANO ("ARRELLANO"). TRAN was  
5 taken to the University of California San Diego Medical Center where he stayed for  
6 approximately 3 months in a coma. TRAN is presently at Sharp Medical Center in San Diego in  
7 a non-communicative vegetative state. Declaration of Joseph Di Monda.

8 TRAN, by and through his guardian ad litem, LE THI NGUYEN ("NGUYEN") filed an  
9 action ("the Third Party Lawsuit") in San Diego Superior Court against ARRELLANO, and also  
10 against Patricia Cole ("COLE"), Chili's Restaurants ("CHILI's") and the City of San Diego ("the  
11 CITY"). San Diego Superior Court Case number 37-2007-00065432-CU-PA-CTL, Department  
12 C-62, the Honorable Ronald L. Styn, Judge. Declaration of Joseph Di Monda.

13 Leonel Arrellano, was arrested by the San Diego Police Department and charged with  
14 driving while intoxicated. On or about February 15, 2007, Mr. Arrellano pled guilty to various  
15 felonies arising out of driving while intoxicated and leaving the scene of an accident. On June 8,  
16 2007, Mr. Arrellano was sentenced to, and is now serving, a six year and four month sentence at  
17 the Sierra Conservation Center in Jamestown, California. Decl. of Joseph Di Monda.

18 TRAN's damages will reach tens of millions of dollars.

19 TRAN reached a tentative settlement with defendant COLE. COLE filed a motion for a  
20 determination of good faith settlement and the CITY opposed COLE's motion. The San Diego  
21 Superior Court is permitting the CITY to conduct discovery into COLE's assets and financial  
22 condition to determine if she should pay a higher settlement amount. COLE's settlement is  
23 pending. Decl. of Joseph Di Monda.

24 CHILI's has filed a motion for summary judgment which TRAN will oppose.

25 TRAN's theory of liability against the CITY is based upon, among other things, TRAN's  
26 allegations that the Stop sign which ARRELLANO failed to stop at was obscured by foliage  
27 which the CITY permitted to grow on CITY owned property, and that the CITY's negligence in  
28 not trimming said foliage created a dangerous condition of public property. ARRELLANO also

1 contends that the Stop sign was obscured by foliage and that he was unable to see said Stop sign  
 2 which is why he failed to stop thereby colliding with TRAN. The CITY is conducting discovery  
 3 on those issues. Decl. of Joseph Di Monda.

4 No judgments have been entered and no determinations of liability as to any party have  
 5 been made. At this time no trial date has been set. Decl. of Joseph Di Monda.

6 ARRELLANO is an illegal alien. Despite his illegal immigration status, Progressive  
 7 West Insurance Company ("Progressive") sold ARRELLANO an automobile liability insurance  
 8 policy ("Liability Policy") in the amount of \$15,000.00. Decl. of Joseph Di Monda.

9 Prior to filing the Third Party Lawsuit, TRAN made a demand on Progressive for  
 10 ARRELLANO's \$15,000.00 Liability Policy. Progressive did not tender the Liability Policy.  
 11 TRAN's position is that since Progressive failed to tender the Liability Policy when demanded,  
 12 the Liability Policy now has no liability limit and that Progressive is liable for any amount which  
 13 a jury may find ARRELLANO must pay.

14 Progressive has filed this present federal lawsuit asking for a declaration of its rights and  
 15 responsibilities under ARRELLANO's \$15,000.00 Liability Policy.

16 Progressive is asking this Court to declare that it has not committed bad faith under  
 17 California insurance law and hence can never be liable for any amount over the \$15,000.00 limit  
 18 of the Liability Policy.

19 **II. SUMMARY OF TRANS' ARGUMENTS AS TO WHY PROGRESSIVE'S**  
 20 **LAWSUIT MUST BE DISMISSED**

- 21 1. The issue is not ripe because there has not been any determination of damages  
 22 which may be owed by any party.
- 23 2. The issue is not ripe because there are a number of events which must occur  
 24 before Progressive may be liable for over-limits bad faith. Such as:  
 25 a. TRAN has to obtain a judgment against ARRELLANO in an amount over  
 26 the \$15,000.00 policy limit. Since ARRELLANO has blamed the CITY  
 27 for the obscured stop sign, a jury may in fact find that the CITY is the  
 28 party which must bear the most liability and find ARRELLANO liable for

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an amount less than the \$75,000.00 minimum required to create federal diversity jurisdiction;

- b. Even if a jury finds ARRELLANO liable for an amount over the \$15,000.00 Policy limit, ARRELLANO would have to assign any bad faith rights to TRAN and TRAN would have to bring an action against Progressive;
- c. ARRELLANO could pass away before any judgment is determined, or before any assignment of bad faith rights is made;
- d. TRAN could pass away thereby cutting off his damages to a far lesser amount.

3. Progressive's alleged \$75,000.00 diversity jurisdiction exceeds its contractual liability, hence Progressive is requesting an advisory opinion as to what it **may** be liable for in the event the above events transpire.

4. The alleged diversity jurisdiction of \$75,000.00 is too speculative at this time to grant this Court jurisdiction.

5. At the time Progressive filed this lawsuit it can never be liable for an amount greater than \$15,000.00.

### **III. PROGRESSIVE HAS THE BURDEN OF PROOF TO SHOW TO A LEGAL CERTAINTY THAT ITS ALLEGED DAMAGES MEET THE JURISDICTIONAL AMOUNT TO PROVIDE THIS COURT WITH DIVERSITY JURISDICTION**

If defendant moves to dismiss for lack of jurisdiction, the burden of proof is normally on the party invoking federal jurisdiction to establish a "good faith" expectation of recovery of at least the minimum jurisdictional amount. *McNutt v. General Motors Accept. Corp. of Indiana* (1936) 298 US 178. 189. 56 S.Ct. 780. 785. Progressive must establish the jurisdictional amount by a preponderance of the evidence. *Meridian Secur. Ins. Co. v. Sadowski* (7th Cir. 2006) 441 F3d 536, 543.

### **IV. PROGRESSIVE'S CLAIMS ARE NOT RIPE AT THE TIME IT FILED THE COMPLAINT; AT THIS TIME IT CAN NEVER BE LIABLE FOR MORE THAN \$15,000; HENCE THIS ACTION IS PREMATURE**

The amount in controversy required to grant this Court diversity jurisdiction must be



ascertained at the commencement of the action; later events generally do not affect diversity jurisdiction. Thus, diversity jurisdiction exists if the complaint as filed puts more than \$75,000 at issue. *Johnson v. Wattenbarger* (7th Cir. 2004) 361 F3d 991, 993.

To justify such dismissal, “(i)t must appear to a legal certainty that the claim is really for less than the jurisdictional amount ...” *St. Paul Mercury Indem. Co. v. Red Cab Co.* (1938) 303 US 283, 288–289, 58 S.Ct. 586, 590.

Courts may look beyond the pleadings for the limited purpose of determining whether it is “legally impossible” for plaintiffs to recover the damages alleged. *Pachinger v. MGM Grand Hotel–Las Vegas, Inc.* (9th Cir. 1986) 802 F2d 362, 364.

A demand is “legally impossible” for jurisdictional purposes when it runs up against a statutory or contractual cap on damages, or when the theories of damages employ double counting. *Johnson v. Wattenbarger* 361 F3d at 994

Moreover, a dismissal may be upheld where defendant's liability is limited by contract to an amount less than the diversity minimum, if the court determines that such limitation is valid and enforceable. *Valhal Corp. v. Sullivan Assocs., Inc.* (3rd Cir. 1995) 44 F3d 195, 209.

Here, Progressive admits in its complaint that its liability policy limits its damages to \$15,000.00; far below the diversity minimum of \$75,000.00.

Moreover, there has been no adjudication of damages and no apportionment of damages between the various defendants. Since the amount in controversy must be established at the time Progressive filed its complaint Progressive can not show to a legal certainty what its financial exposure may be when the lawsuit is adjudicated.

Hence, at this time, Progressive has no way of knowing exactly what amount its insured ARRELLANO may be found liable to have to pay to TRAN.

#### **V. PROGRESSIVE SPECULATES AS TO ITS POTENTIAL DAMAGES IN ORDER TO CREATE SHAM DIVERSITY JURISDICTION**

Here, plaintiff claims a right so intangible that its value is entirely speculative. To wit, how much Progressive may be liable to pay after adjudication of the San Diego action involving the issue of liability amongst 4 defendants. At this time no one can predict to a legal certainty

1 who will be found liable and how damages may be apportioned.

2 In such cases, diversity jurisdiction will not lie for lack of jurisdictional amount. *Jackson*  
3 *v. American Bar Ass'n* (9th Cir. 1976) 538 F2d 829, 831.

4 **VI. JURISDICTION MAY NOT BE BASED UPON PROGRESSIVE'S**  
5 **SPECULATIVE ALLEGATIONS THAT IT MAY HAVE COMMITTED BAD**  
6 **FAITH AND THEREFORE MAY BE LIABLE FOR AN AMOUNT EXCEEDING**  
7 **\$75,000.00**

8 A party cannot meet the jurisdictional amount by seeking a declaration of an additional  
9 coverage not in issue at that time. *Nationwide Mut. Ins. Co. v. Rowles by Rowles*, 818 F. Supp.  
10 852 (E.D. Pa. 1993).

11 In declaratory judgment suits involving liability insurance policies, the test of jurisdiction  
12 is the maximum amount for which the insurer might be liable under the policy. *Budget*  
13 *Rent-A-Car, Inc. v. Higashiguchi*, (9th Cir. 1997) 109 F.3d 1471, 1473.

14 Here, absent bad faith by Progressive, combined with a jury determination of damages,  
15 Progressive's maximum liability under the policy is \$15,000.00.

16 A very similar issue was addressed by the court in *St. Paul Reinsurance Co., Ltd. v.*  
17 *Greenberg* (1998) 134 F.3d 1250. *St. Paul* addressed the potential for over-limits damages based  
18 upon Texas law. The *St. Paul* court found diversity jurisdiction based upon Texas law which  
19 provided for statutory damages for failure to pay a claim. *Id.* at 1254-1255. However, it was  
20 only because of the statutory penalties, which were known to a certainty and put the claim over  
21 the diversity limit which gave the *St. Paul* court diversity jurisdiction.

22 Applying the analysis of *St. Paul* to the present facts, diversity jurisdiction will not be  
23 found because "bare allegations of jurisdictional facts have been held insufficient to invest a  
24 federal court with jurisdiction." . *Id.* at 1253.

25 In *St. Paul*, the insured threatened to file a complaint against its insurer for not providing  
26 coverage and had stated the amount in controversy. Here, ARRELLANO has made no such  
27 threat to Progressive nor stated any amount. On the contrary, Progressive's federal complaint  
28 admits that any threats to sue have been made by TRAN, who is not a party to the insurance

1 contract.

2 In finding diversity jurisdiction the *St Paul* court looked at the threats made by the  
3 insured, not a potential third party litigant, and the damages the insured threatened to sue its  
4 insurer for the insurers failure to provide insurance coverage.

5 The exact opposite is happening here.

6 Here, Progressive is seeking to use the potential of extra-contractual bad-faith as the basis  
7 for invoking diversity jurisdiction, based upon an assumption that:

8 ARRELLANO will be liable for an amount exceeding \$75,000.00 and that  
9 ARRELLANO will assign the bad faith rights to TRAN and TRAN will sue Progressive. No one  
10 knows to a legal certainty, at this time, what amount ARRELLANO may be liable for and what  
11 events may transpire after adjudication of the State court action.

12 This lawsuit is nothing but a sham by Progressive to litigate a potential future bad faith  
13 action between it and TRAN prior to any adjudication of ARRELLANO's liability.

14 Progressive's entire complaint is premature and relies on speculation.

15 Frankly, if Progressive put as much effort into defending ARRELLANO against TRAN's  
16 San Diego Superior Court lawsuit as it is putting into trying to get out of indemnifying  
17 ARRELLANO, perhaps ARRELLANO could be successful in convincing a jury that the CITY  
18 and/or CHILI's are the responsible parties.

19 **VII. PROGRESSIVE FILES A SHAM COMPLAINT IN ORDER TO LIMIT**  
20 **ARGUMENTS TO THE COMPLAINT'S FOUR CORNERS SO AS TO DENY**  
21 **DEFENDANTS' RIGHT TO DUE PROCESS, DISCOVERY AND JURY TRIAL**

22 Progressive alleges that it has a \$15,000 contract of insurance, which on its face is  
23 beneath the \$75,000 Federal jurisdictional threshold. Progressive then makes a conclusory  
24 allegation that the value in controversy exceeds \$75,000. The value in controversy can only  
25 exceed \$15,000 if there is insurance bad faith on the part of Progressive because it failed to  
26 timely settle the third party claims against its insured Arrellano by also failing to meet the  
27 conditions of Tran's settlement offer.

28 The determination of damages against Arrellano is already the subject of the San Diego

1 Superior Court personal injury litigation, and will not be determined until after this State  
2 litigation is concluded. Progressive is not a party to the State litigation, but its insured Arrellano  
3 is a party.

4 Progressive would be a hypothetical party in a potential future action only in the event  
5 that an over limits judgment is rendered against Arrellano, at which time Arrellano may assign  
6 the right to collect the over limits judgments to Bun Bun Tran while reserving the right to sue  
7 Progressive for emotional distress and punitive damages, as recommended in *Cain vs. State*  
8 *Farm* (1975) 47 Cal.App.3rd 783.

9 Only after such a bad faith lawsuit is filed may the bad faith plaintiffs discover  
10 Progressive's claims file generated in the San Diego Superior Court action. Progressive's claims  
11 file is discoverable because, "how else could they [plaintiffs] have properly determined whether  
12 (insurer) acted fairly and in good faith in its handling of the claim?" *2022 Ranch, LLC vs.*  
13 *Superior Court (Chicago Title Insurance Co. (2003) 113 Cal.App.4th 1377, 1396; Amato vs.*  
14 *Mercury Casualty* (1993) 18 Cal.App.4th 1784, 1788-1789.

15 In addition, only during the post-judgment secondary bad faith lawsuit may the bad faith  
16 plaintiffs discover the liability insurer's claims manual to ascertain whether it violated its own  
17 internal investigation procedures. *Glenfed Development Corporation vs. Superior Court*  
18 *(National Union Fire Insurance Co. (1997) 53 Cal.App.4th 1113, 1118.*

19 Progressive is attempting to "sham" this court into finding that only \$15,000 is owed  
20 contractually, thereby allowing it to fraudulently maintain in the future that this court had to  
21 "implicitly" find that there was no tort or bad faith liability above \$15,000 on the part of  
22 Progressive when rejecting a policy limits demand previously made by counsel for Bun Tran.

23 To add insult to injury, Progressive is asking this court to make a finding of only \$15,000  
24 being owed, either contractually, explicitly, or extra contractually implicitly, without this court  
25 having any opportunity to review, for instance, the claim's file and claim's manual, which can  
26 only be discovered after the conclusion and finality of the bodily injury case currently pending in  
27 San Diego Superior Court.

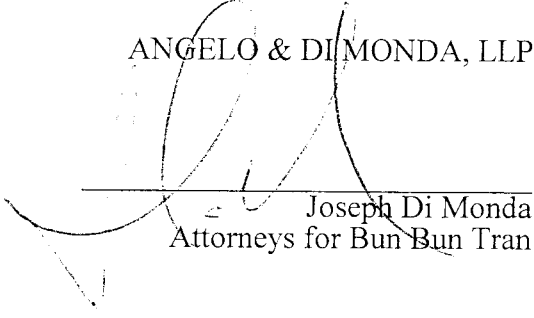
28 ///

**VIII. CONCLUSION**

For the above reasons, TRAN requests this court to dismiss this complaint for lack of diversity jurisdiction.

November 24, 2007

ANGELO & DI MONDA, LLP

  
\_\_\_\_\_  
Joseph Di Monda  
Attorneys for Bun Bun Tran

**DECLARATION OF JOSEPH DI MONDA, ESQ,**

I, Joseph Di Monda, declare,

1. I am over the age of 18 years, I have personal knowledge of the facts stated herein and if called as a witness I would and could competently testify as follows;

2. I am an attorney at law duly admitted to practice before all the courts of the State of California, the United States District Court for the Southern District of California and the Court of Appeals for the Ninth Circuit and the attorney of record herein for defendant Bun Bun Tran ("TRAN") and make this declaration in support of the motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. Rule of Civ. Proc. 12(b)(1).

3. BUN BUN TRAN was catastrophically injured in an automobile accident on November 18, 2006, in the City of San Diego.

4. The vehicle which collided with TRAN was driven by defendant LEONAL ARRELLANO.

5. Immediately after the accident TRAN was taken to the University of California San Diego Medical Center where he stayed for approximately 3 months in a coma.

6. TRAN is presently at Sharp Medical Center in San Diego in a non-communicative vegetative state where he has been for approximately 11 months.

7. TRAN, by and through his guardian ad litem, LE THI NGUYEN filed an action in San Diego Superior Court against ARRELLANO, and also against Patricia Cole, Chili's Restaurants and the City of San Diego. San Diego Superior Court Case number 37-2007-00065432-CU-PA-CTL, Department C-62, the Honorable Ronald L. Styn, Judge.

8. Defendant ARRELLANO was charged with driving while intoxicated, failing to stop at a stop sign and leaving the accident scene. ARRELLANO is presently serving a 6 year sentence in the California prison system.

9. TRAN's theory of liability against the CITY is based upon, among other things.

TRAN's allegations that the Stop sign which ARRELLANO failed to stop at was obscured by foliage which the CITY permitted to grow on CITY owned property, and that the CITY's negligence in not trimming said foliage created a dangerous condition of public property. ARRELLANO also contends that the Stop sign was obscured by foliage and that he was unable to see said Stop sign which is why he failed to stop thereby colliding with TRAN. The CITY is conducting discovery on those issues.

10. No judgments have been entered and no determinations of liability as to any party have been made in the above referenced lawsuit filed in the San Diego Superior Court. At this time no trial date has been set.

11. ARRELLANO is an illegal alien.

12. Despite his illegal immigration status, plaintiff Progressive West Insurance Company sold ARRELLANO an automobile liability insurance policy in the amount of \$15,000.00.

13. Prior to filing the above referenced San Diego Superior Court lawsuit, TRAN made a demand on Progressive for ARRELLANO's \$15,000.00 liability policy.

14. It is TRAN's contention that Progressive did not tender the Liability Policy. TRAN's position is that since Progressive failed to tender the Liability Policy when demanded, the Liability Policy now has no liability limit and that Progressive is liable for any amount which a jury may find ARRELLANO must pay.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 27, 2007, at Manhattan Beach California.



Joseph Di Monda

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA

3 COUNTY OF LOS ANGELES

4 I am a resident of the aforesaid county. I am over the age of eighteen years and not a party  
5 to the within action; my address is 1721 N. Sepulveda Blvd., Manhattan Beach, California  
6 90266.

7 On November <sup>25</sup>~~27~~, 2007, I served the foregoing document(s) described as **NOTICE OF  
8 MOTION AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER  
9 JURISDICTION; RULE 12(b)(1)**

on the interested parties in this action, by placing the original/true copies thereof enclosed in a  
sealed envelope addressed as follows:

10 **SEE ATTACHED SERVICE LIST**

11 — I caused such envelope/package containing the document(s) to be delivered by hand to the  
12 offices of the addressee(s).

13 X The envelope was mailed with postage thereon fully prepaid. I am "readily" familiar with the  
14 firm's practice of collection and processing correspondence for mailing. It is deposited with  
15 U.S. Postal Service on that same day in the ordinary course of business. I am aware that on  
16 motion of a party served, service is presumed invalid if the postal cancellation date or  
17 postage meter date is more than one day after date of deposit for mailing an affidavit.

18 — I deposited the above document(s) for facsimile transmission in accordance with the office  
19 practice of Angelo & Di Monda for collecting and processing facsimiles. I am familiar with  
20 the office practice of Angelo & Di Monda for collecting, processing, and transmitting  
21 facsimiles. The facsimile of the above document(s) was transmitted to the interested parties  
22 on the attached service list:

23 Executed on November <sup>25</sup>~~27~~, 2007, at Manhattan Beach, California.

24 I declare under penalty of perjury under the laws of the State of California that the above is  
25 true and correct.

26   
27 Gloria Henderson  
28

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Service List

ROBIE & MATTHAI  
James R. Robie  
500 South Grand Avenue  
15<sup>th</sup> Floor  
Los Angeles, CA 90071

Print Message

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**Date** 2007/11/28 Wed AM 11:56:56 CST  
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**Subject** Activity in Case 3:07-cv-01999-JAH-POR Progressive West Insurance Company v. Tran et al Motion to Dismiss/Lack of Jurisdiction

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U.S. District Court

Southern District of California

### Notice of Electronic Filing

The following transaction was entered by Di Monda, Joseph on 11/28/2007 at 9:56 AM PST and filed on 11/28/2007

**Case Name:** Progressive West Insurance Company v. Tran et al  
**Case Number:** 3:07-cv-1999  
**Filer:** Bun Bun Tran  
**Document Number:** 4

**Docket Text:**

MOTION to Dismiss for Lack of Jurisdiction by Bun Bun Tran. (Di Monda, Joseph)

**3:07-cv-1999 Notice has been electronically mailed to:**

Joseph Di Monda jdaia@aol.com, adlaw@verizon.net

**3:07-cv-1999 Notice has been delivered by other means to:**

James Raymond Robie  
Robie and Matthai  
500 South Grand Avenue  
Suite 1500  
Los Angeles, CA 90071-2609

The following document(s) are associated with this transaction:

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[STAMP doccfStamp\_ID=1106146653 [Date=11/28/2007] [FileNumber=2292752-0] [28c0d2482ae265815fefa5bcfd0e02006eb1eb7b1d6e7ea2110bb64d2cddffa064108a3342b839fd49c527681b3393820e19775926486d844deb3da22a69efcf]]

000015

## **EXHIBIT 2**

JAMES R. ROBIE, SBN 67303  
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Attorneys for Plaintiff PROGRESSIVE WEST  
INSURANCE COMPANY

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PROGRESSIVE WEST INSURANCE )  
COMPANY, an Ohio corporation, )

Plaintiff, )

vs. )

BUN BUN TRAN, LEONEL )  
ARRELLANO, )

Defendants. )

**CASE NO. 07 - CV 1999 JAH (POR)**

**OPPOSITION TO MOTION TO  
DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION [RULE  
12(b)(1)]**

Date: January 14, 2008  
Time: 2:30 p.m.  
Ct. No.: 11  
880 Front Street  
San Diego, CA 92101

Plaintiff Progressive West Insurance Company ("Progressive") submits the following Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction:

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# MEMORANDUM OF POINTS AND AUTHORITIES

## INTRODUCTION

Plaintiff Progressive West Insurance Company (“Progressive”) filed this action pursuant to the Federal Declaratory Judgment Act, 28 USCA § 2201. Defendant Bun Bun Tran (“Tran”) has filed a motion to dismiss this lawsuit pursuant to Rule 12(b)(1), contending that this Court lacks subject matter jurisdiction to hear the case. Tran’s motion is brought on two grounds: (1) the controversy between Progressive is not ripe because there is no judgment against Arrellano; and (2) the amount in controversy is “speculative” and does not meet the jurisdictional minimum. Neither ground has merit. Tran fails to acknowledge that this case is a declaratory relief action, subject to unique procedural requirements of the Declaratory Judgment Act and judicial interpretations of the Act.

Tran’s failure to recognize the unique procedural requirements of a declaratory relief action is fatal to his motion. Established law provides that under the well-pleaded facts of the Complaint (as well the extrinsic facts presented by Tran’s attorney’s declaration), a litigable controversy exists between Progressive and Tran, and that the amount in controversy is well in excess of the jurisdictional minimum. Tran’s motion must be denied.

## LEGAL DISCUSSION

### **1. The Declaratory Relief Act.**

The Declaratory Judgment Act provides: “In a case of actual controversy within its jurisdiction [except specified federal tax actions and bankruptcy proceedings] . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” (28 USCA § 2201(a).) The Act allows adjudication of the parties’ rights and obligations on a matter in dispute regardless of whether claims for damages or injunctive relief have yet arisen: “In effect, it brings to the present a litigable controversy which otherwise might only be tried in the future.” (*Societe de*

1 *Conditionnement v. Hunter Eng. Co., Inc.* (9th Cir. 1981) 655 F.2d 938, 943; see also  
 2 *Dickinson v. Indiana State Election Board* (7th Cir. 1991) 933 F.2d 497.

3 Thus, contrary to defendant's protests, this action for declaratory relief may not  
 4 be dismissed because the issue is not ripe. "The purpose of the Declaratory Judgment  
 5 Act is to settle actual controversies *before* they ripen into violations of law or breach  
 6 of duty." (*United States v Fisher-Otis Co.* (10th Cir. 1974) 496 F.2d 1146, 1151,  
 7 emphasis added; *White v Califano* (D.S.D. 1977 ) 437 F.Supp. 543, *affd* (8th Cir.  
 8 1978) 581 F.2d 697 [purpose of declaratory judgment is to provide prospective  
 9 relief].) As shown below, an actual litigable controversy exists between Progressive  
 10 and Tran, a controversy which otherwise might only be tried in the future, and a  
 11 controversy which plaintiff desires to resolve now, through this properly filed  
 12 declaratory relief action.

13 **2. An Actual Controversy Exists Between Plaintiff and Defendant.**

14 Plaintiff has properly alleged that an actual litigable controversy exists between  
 15 Progressive and Tran. The Complaint alleges that:

16 "20. The correspondence, pleadings and discovery proceedings in the above  
 17 captioned lawsuit make clear that attorney Angelo intends to obtain a judgment  
 18 against Mr. Arrellano and then sue Progressive on behalf of Mr. Tran for breach of  
 19 contract and breach of the implied covenant of good faith and fair dealing for failure  
 20 to settle Mr. Tran's claim within policy limits.

21 21. Attorney Angelo has accused Progressive of misconduct and claims that  
 22 Progressive's failure to accept Attorney Nguyen's January 26, 2007 policy limits  
 23 demand has eliminated the stated limits of the policy. As a result of the erroneous  
 24 contention that Progressive has "taken the lid off its policy" by not accepting  
 25 Attorney Nguyen's conditional demand of January 26, 2007, Mr. Tran claims, *inter*  
 26 *alia*, that a conflict of interest has arisen between Progressive's defense counsel and  
 27 Mr. Arrellano, that Mr. Arrellano should stipulate to a multi-million dollar judgment  
 28 and that Progressive should bear liability for these extracontractual claims. A copy of

1 the letter of June 28, 2007, from Mr. Tran's attorney is here attached as Exhibit 2.  
2 Progressive denies and disputes these allegations and contends it has not rejected a  
3 settlement within policy limits which would lead to such consequences claimed by  
4 defendant Mr. Tran.

5 22. An actual controversy has arisen and now exists between the parties  
6 relating to the legal rights and duties of plaintiff and defendants under the involved  
7 policy of insurance, for which plaintiff desires a declaration of rights.

8 23. A declaratory judgment is necessary in that plaintiff contends it  
9 discharged its obligations under the insurance policy and in accord with California  
10 law and that its conduct in response to the letter of attorney Nguyen (Exhibit 1) did  
11 not eliminate or jeopardize the \$15,000 policy limits available on the contract at  
12 issue."

13 (Complaint, ¶¶ 20-23.)

14 The evidence submitted by Defendant in support of its Motion further  
15 demonstrates that an actual controversy exists. The Declaration of Joseph Di Monda  
16 states: "It is TRAN's contention that Progressive did not tender the Liability Policy.  
17 TRAN's position is that since Progressive failed to tender the Liability Policy when  
18 demanded, the Liability policy has no liability limit and that Progressive is liable for  
19 any amount which a jury may find ARELLANO must pay." (Declaration of Joseph  
20 Di Monda, ¶ 14.)

21 Further evidence of Defendant's intention to pursue a bad faith action against  
22 Progressive is attached to this Motion as Exhibit A. Exhibit A is a November 29,  
23 2007 letter in which Tran's attorneys attempt to badger Progressive into agreeing to  
24 an assignment of Arrellano's bad faith claim to Tran. Enclosed with the letter is a  
25 document entitled "AGREEMENT TO ASSIGN PROCEEDS AND COVENANT  
26 NOT TO LEVY EXECUTION OF JUDGMENT OR, IN THE ALTERNATIVE, TO  
27 STAY LEVY OF EXECUTION OF JUDGMENT." The Agreement provides that  
28 Arrellano will assign to Tran his claims against Progressive in exchange for a

1 covenant not to execute upon the judgment.. (Exh. A, pp. 3-6.)

2 In the event that Arrellano agrees to the assignment, Tran may recover from the  
3 insurer both the amount of the judgment and whatever defense costs were incurred by  
4 the insured. (*National Steel Corp. v. Golden Eagle Ins. Co.* (9th Cir. 1997) 121 F.3d  
5 496, 501.) Even if Arrellano does not assign his rights, Tran may obtain a judgment  
6 against Arrellano and sue Progressive as a third party beneficiary. (Cal. Ins. Code, §  
7 11580(b)(2); *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 942-944.) Either  
8 way, Tran threatens litigation against Progressive.

9 A party seeking declaratory relief must show that an actual controversy exists.  
10 (28 USCA § 2201.) The test is whether there is a “substantial controversy, between  
11 parties having adverse legal interests, of sufficient immediacy and reality to warrant  
12 the issuance of a declaratory judgment.” (*Maryland Cas. Co. v. Pacific Coal & Oil*  
13 *Co.* (1941) 312 U.S. 270, 273, 61 S.Ct. 510, 512; *Hillblom v. United States* (9th Cir.  
14 1990) 896 F.2d 426, 430; *Venator Group Specialty, Inc. v. Matthew/Muniot Family,*  
15 *LLC* (5th Cir. 2003) 322 F.3d 835, 838.)

16 The party seeking declaratory relief must show an explicit threat of litigation or  
17 other action creating a reasonable apprehension that he or she will be subjected to  
18 liability. (*Intellectual Property Develop., Inc. v. TCI Cablevision of Calif., Inc.* (Fed.  
19 Cir. 2001) 248 F.3d 1333, 1340; *Paramount Pictures Corp. v. Replay TV* (CD CA  
20 2004) 298 F.Supp.2d 921, 924.)

21 Declaratory relief may be proper even if a party’s liability is contingent. An  
22 “actual controversy” exists if the contingency is likely to occur. Thus, for example,  
23 declaratory relief is frequently granted to insurers in coverage disputes with their  
24 insureds. even though the insurer’s liability to indemnify the insured is contingent on  
25 its insured being held liable to a third party. (*Associated Indem. Corp. v. Fairchild*  
26 *Industries, Inc.* (2nd Cir. 1992) 961 F.2d 32, 35.)

27 Here, it the evidence undisputed that Tran has made an explicit threat of  
28 litigation against Progressive. Tran does not dispute the fact that he *will* sue



1 Progressive – attorney Di Monda’s declaration admits that Tran will pursue  
 2 Progressive for any amount above the policy limit which a jury may find Arrellano  
 3 must pay. Thus, Tran has created a reasonable apprehension that Progressive will be  
 4 subjected to liability for any judgment against Arrellano in excess of the \$15,000  
 5 policy limits. (*Intellectual Property Develop., Inc. v. TCI Cablevision of Calif., Inc.*  
 6 (Fed. Cir. 2001) 248 F.3d 1333, 1340; *Paramount Pictures Corp. v. Replay TV* (CD  
 7 CA 2004) 298 F.Supp.2d 921, 924.)

8 Further, although Progressive’s liability is contingent on Arrellano’s liability to  
 9 Tran in the underlying action, “[t]hat the liability may be contingent does not  
 10 necessarily defeat jurisdiction of a declaratory judgment action.” (*Associated Indem.*  
 11 *Corp. v. Fairchild Industries, Inc.* (2nd Cir. 1992) 961 F.2d 32, 35, citing *American*  
 12 *Mach. & Metals, Inc. v. De Bothezat Impeller Co.*, 166 F.2d 535, 536, 76 U.S.P.Q.  
 13 (BNA) 549 (2d Cir. 1948); *National R.R. Passenger Corp. v. Consolidated Rail*  
 14 *Corp.*, 670 F. Supp. 424, 430-31 (D.D.C. 1987); and *Lumbermens Mut. Casualty Co.*  
 15 *v. Borden Co.*, 241 F. Supp. 683, 701 (S.D.N.Y. 1965). “Indeed, litigation over  
 16 insurance coverage has become the paradigm for asserting jurisdiction despite  
 17 ““future contingencies that will determine whether a controversy ever actually  
 18 becomes real.”” (*Associated Indem. Corp. v. Fairchild Industries, Inc.* (2nd Cir.  
 19 1992) 961 F.2d 32, 35, citing 10A C. Wright, A. Miller & M. Kane, *Federal Practice*  
 20 *and Procedure*, § 2757, at 586-587 (2d ed. 1983).)

21 The applicability of an insurer’s policy limits as to an injured third party is the  
 22 proper subject of a declaratory relief action, as an actual controversy exists between  
 23 the parties. For example, the Seventh Circuit has held that a victim of an insured  
 24 need not wait until he or she has judgment against the insured before filing  
 25 declaratory relief action against insurer to ascertain that the policy remains in effect  
 26 up to the policy limit; suit can be filed before dispute with insurer is resolved, thus  
 27 maintaining victim’s interest in insurance policy. (*Bankers Trust Co. v. Old Republic*  
 28 *Ins. Co.* (7th Cir 1992) 959 F.2d 677. ) As in *Bankers Trust*, through this lawsuit

Progressive seeks to ascertain that Mr. Arrellano's policy limits remain in effect. Dismissal is unwarranted.

**3. The Jurisdictional Amount in Controversy Is the Value of the Claims Asserted Against the Insured, Not the Face Amount of the Policy.**

The Complaint alleges that Tran's damages, which he seeks to recover against Arrellano, and in a future lawsuit will seek to recover from Progressive, are in excess of \$700,000. The evidence of the value of plaintiff's claim is Exhibit 1 to the Complaint, a demand letter from defendant Tran's attorney. (Complaint, ¶ 11 and Exh. 1.) Defendant admits that "TRAN's damages will reach tens of millions of dollars." (Motion to Dismiss, page 3, line 18.)

The Declaratory Judgment Act is not an independent basis for federal jurisdiction. (*Skelly Oil Co. v. Philips Petroleum Co.* (1950) 339 U.S. 667, 671.) Thus, a party seeking declaratory relief must show that the controversy regards a matter within federal court subject matter jurisdiction – the action must be either between parties of diverse citizenship or "arise under" federal law. (*Fitts v. Federal Nat'l Mrtg. Ass'n* (D.D.C. 1999) 44 F.Supp.2d 317, 330; USCA §§ 1331, 1332.) Where diversity jurisdiction exists, the federal district court has discretion to hear a declaratory judgment action. (*Avemco Ins. Co. v. Davenport* (9th Cir. 1998) 140 F.3d 839, 842, fn. 1.) Under the facts alleged (which are not disputed by defendant), where the accident victim is a California resident and Progressive is an Ohio corporation, the parties are of diverse citizenship, and federal subject matter jurisdiction exists.

Diversity jurisdiction exists only "where the matter in controversy exceeds the sum or value of \$75,000 exclusive of interest and costs . . ." (28 USCA § 1332(a).) For diversity purposes under the Declaratory Relief Act, the amount in controversy is the value of the object of the litigation. Where the action seeks a determination of one party's liability to another, the amount of *potential liability* is the amount in controversy, not the policy's limits, as Defendant contends.

1 For example, in *Hartford Ins. Group v. Lou-Con Inc.* (5th Cir. 2002) 293 F.3d  
 2 908, Hartford sued its insured for declaratory relief that its liability insurance policy  
 3 did not cover environmental pollution claims against the insured by third parties. The  
 4 policy had \$1 million liability limits but the third parties' claims were less than  
 5 \$75,000. The Court held that the jurisdictional amount in controversy was the value  
 6 of the claims presently asserted against Insured, *not* the face amount of the policy.  
 7 (*Id.* at 911 ["in declaratory judgment cases that involve the applicability of an  
 8 insurance policy to a particular occurrence, 'the jurisdictional amount in controversy  
 9 is measured by the value of the underlying claim- not the face amount of the  
 10 policy'"].)

11 Therefore, here, the value of Tran's underlying claim against Arrellano (and  
 12 Tran's future claim Progressive), *not* the \$15,000 policy limit, is the proper measure  
 13 of the jurisdictional amount in controversy. Tran's attorney's demand letter asserted  
 14 that as of January 26, 2007, Tran's claim against Arrellano was in excess of  
 15 \$700,000. Defendant admits that "TRAN's damages will reach tens of millions of  
 16 dollars." (Motion to Dismiss, page 3, line 18.) Either figure is well in excess of the  
 17 \$75,000 jurisdictional minimum, and is sufficient to survive a Rule 12(b)(1) motion.  
 18 (*Farmilant v. Singapore Airlines, Ltd.* (ND IL 1983) 561 F.Supp. 1148, 1151 [on  
 19 motion to dismiss for want of subject matter jurisdiction, plaintiff "is entitled to the  
 20 speculative benefit of any facts he might conceivably prove in support of his well-  
 21 pleaded allegations"]; *Musson Theatrical, Inc. v. Federal Express Corp.* (6<sup>th</sup> Cir.  
 22 1996) 89 F.3d 1244, 1248 ["plaintiff can survive (a Rule 12(b)(1)) motion by  
 23 showing any arguable basis in law for the claim made"].)

#### 24 **4. Tran Misunderstands the Scope of This Declaratory Relief Action.**

25 Tran complains that Progressive has improperly filed this lawsuit in order to  
 26 obtain an advance determination of its bad faith liability before the underlying case is  
 27 resolved, and before the claims file is discoverable. (Motion, page 8, line 22 to page  
 28 9, line 27.) In doing so, Tran intentionally mischaracterizes the scope of this

1 declaratory relief action, which does *not* implicate the totality of Progressive's claims  
2 handling in the underlying case and does not pretend to serve as a substitute for a bad  
3 faith lawsuit. Rather, this declaratory relief action was brought to determine the legal  
4 relationship of the parties on a single, narrow issue:

5 A declaratory judgment is necessary in that plaintiff contends it  
6 discharged its obligations under the insurance policy and in accord with  
7 California law and that its conduct in response to the letter of attorney  
8 Nguyen (Exhibit 1) did not eliminate or jeopardize the \$15,000 policy  
9 limits available on the contract at issue.

10 (Complaint, ¶ 23.)

11 Thus, Progressive merely seeks a determination on the actual controversy in  
12 existence *now* between Progressive and Tran – whether attorney Nguyen's letter  
13 (Exhibit 1 to the Complaint) was a policy limits demand and whether Progressive's  
14 conduct in response to that one letter "eliminated" the \$15,000 limits on Arrellano's  
15 policy.

16 The issue before this Court is clearly and narrowly defined: was the letter from  
17 attorney Nguyen a legally cognizable "policy limits demand"? If the letter was not  
18 such a demand (for example if it called for performance outside the insurance  
19 agreement or because it was not an unequivocal offer to dismiss and release the  
20 insured in exchange for a payment of money within the coverage afforded by the  
21 policy), then Progressive's indemnity obligation is still defined by the stated \$15,000  
22 limits under the policy. The entirety of Progressive's conduct in handling the  
23 underlying claim need not be determined in this lawsuit.

### 24 CONCLUSION

25 Defendant's motion is not well taken and must be denied. Judicial opinions  
26 interpreting the Declaratory Relief Act, legal authority to which Defendant has turned  
27 a blind eye, provide (1) that the facts involved in this lawsuit present a litigable  
28 controversy; and (2) that the amount in controversy is measured by Tran's claim

1 against Arrellano – a claim that Defendant’s attorneys admit is worth “tens of  
2 millions of dollars.”

3 DATED: December 27, 2007

ROBIE & MATTHAI  
A Professional Corporation

By: 

JAMES R. ROBIE  
KYLE KVETON  
RONALD P. FUNNELL  
Attorneys for Plaintiff PROGRESSIVE WEST  
INSURANCE COMPANY

ANGELO & DI MONDA  
A LIMITED LIABILITY PARTNERSHIP

CHRISTOPHER E. ANGELO  
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TELEPHONE: (310) 939-0023  
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November 29, 2007

LEGAL - RECEIVED  
DEC 03 2007

Sean W. Allen  
Claims Attorney  
PROGRESSIVE CASUALTY  
INSURANCE COMPANY  
Claims Legal Department  
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Fax : (916) 904-5563  
<http://www.progressive.com>

Re: Your Insured : Arrellano, Leonel  
Claim No. : 060-409-287  
Date of Loss : 11/18/06

Dear Mr. Allen:

I have received your November 23, 2007 letter that is copied to Randy Winet. I left a voicemail message on your message machine asking you to first tell me why you did not get a copy of the "Covenant Assignment" from Randy Winet directly, the same Randy Winet that you copied on your November 23, 2007 letter. You never returned that telephone message of mine. Why?

Your November 23, 2007 letter expressly states that you "do not have a copy of the "Covenant/Assignment" and, therefore, cannot provide any response. Please forward it to my attention. . . " Do you know why Mr. Randy Winet failed to send you a copy of the "Covenant Assignment" long ago when I first sent it to him personally? Is it because Mr. Winet does not want to ask Progressive's permission to reach and sign a stipulation that a covenant not to execute will not be used by Progressive later in an effort to attack the viability of Mr. Arellano's assignment of bad faith rights to collect the overlimits judgment against Progressive?

Does Progressive believe that your November 23, 2007 letter request somehow allows it to disguise the otherwise close working relationship between it and Mr. Winet independent of the interests of Arrellano?

000026

ANGELO & DI MONDA  
A LIMITED LIABILITY PARTNERSHIP

Sean W. Allen  
Claims Attorney  
PROGRESSIVE CASUALTY  
November 29, 2007  
Re: Arrelano, Leonel  
page 2

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Despite your strange November 23, 2007 letter request asking for a document that you could have received long ago, enclosed please find a copy of the document you requested, entitled: "AGREEMENT TO ASSIGN PROCEEDS AND COVENANT NOT TO LEVY EXECUTION OF JUDGMENT OR, IN THE ALTERNATIVE, TO STAY LEVY OF EXECUTION OF JUDGMENT."

If Progressive is to be a signatory on the last page, it must be by a person who warrants that he has the authority to sign on behalf of Progressive Casualty Insurance Company, Progressive West Insurance Company and Progressive Insurance Co. One would have to add any other Progressive entity that is somehow involved in the underwriting and claims handling.

Very truly yours,

ANGELO & DI MONDA, LLP

  
By: CHRISTOPHER E. ANGELO

CEA/gh  
Encl.

cc: Randy Winet



AGREEMENT TO ASSIGN PROCEEDS AND COVENANT NOT TO LEVY  
EXECUTION OF JUDGMENT OR, IN THE ALTERNATIVE, TO STAY  
LEVY OF EXECUTION OF JUDGMENT

This Agreement is entered into between Bun Bun Tran, by and through his mother and Guardian ad Litem, Le Thi Nguyen [hereinafter referred to as "plaintiff"] and Leonel Arellano [hereinafter referred to as "defendant"].

RECITALS

1. WHEREAS, the parties are currently engaged in litigation as more fully set forth in that certain action for damages entitled *Bun Bun Tran v. Leonel Arellano, et al.*, San Diego Superior Court case No. 37-2007-00065432-CU-PA-CTL [hereinafter referred to as "THE ACTION"], and

2. WHEREAS, certain issues have arisen pertaining to a failure to settle all Bun Bun Tran bodily injury claims against Leonel Arellano on the part of Progressive West Insurance Company, Progressive Insurance Company and other Progressive entities [hereinafter referred to as "Progressive"], and

3. WHEREAS, Leonel Arellano contends that Progressive breached the implied covenant of good faith and fair dealing and/or otherwise acted negligently or tortiously toward him, as a direct and legal result of which Arellano is now personally exposed to an adverse judgment in favor of Bun Bun Tran in THE ACTION in excess of Leonel Arellano's liability insurance policy limits, and

4. WHEREAS, the parties wish to set forth herein their respective rights and obligations with regard to the continued prosecution and resolution of THE ACTION as well as the liabilities, exposures and risks relating thereto,

IT IS HEREBY AGREED AS FOLLOWS:

MUTUAL PROMISES AND ASSIGNMENTS

1. Leonel Arellano, for himself, his successors and assigns, hereby irrevocably assigns the proceeds, i.e., the money damages which he may recover and which he may be entitled to collect by way of settlement, award or judgment rendered in his favor and against Progressive in any insurance bad faith case based upon breach of the implied covenant of good faith and fair dealing or any other similar action which might or could potentially be filed by Leonel Arellano against Progressive arising out of personal overlimits exposure resulting from THE ACTION and seeking the same relief.

2. The assignment of proceeds as set forth in paragraph 1 immediately preceding shall not exceed the amount of any judgment, award or settlement rendered in favor of plaintiff Bun Bun Tran against defendant Leonel Arellano in THE ACTION. Such judgment shall



include the principal amount together with recoverable costs and accrued interest thereon at the legal rate until actually paid or satisfied.

3. To the extent that defendant Leonel Arellano recovers damages, either compensatory or punitive, or both, against Progressive in his own insurance bad faith case based upon breach of the implied covenant of good faith and fair dealing, or in any similar action arising out of the same overlimits exposure subject matter and seeking the same relief, then to the extent that the total amount of such damages exceeds the amount of the bodily injury judgment in favor of Bun Bun Tran against defendant Leonel Arellano in THE ACTION as described in paragraph 2 immediately preceding, then such excess damages and the right to collect such excess damages shall be the sole property of Leonel Arellano.

4. Upon the entry of judgment in favor of plaintiff Bun Bun Tran in THE ACTION, plaintiff Bun Bun Tran, as a judgment creditor, will petition for leave to file a complaint-in-intervention in any future insurance bad faith lawsuit filed, if filed at all, by Leonel Arellano against Progressive for bad faith breach of the implied covenant of good faith and fair dealing and any similar related tort. Defendant Leonel Arellano hereby agrees to stipulate to the filing of said complaint-in-intervention by Bun Bun Tran. If Leonel Arellano never files his own insurance bad faith case against Progressive, this failure, it is so agreed, will in no way impair defendant Leonel Arellano's instant assignment to plaintiff Bun Bun Tran of Leonel Arellano's right to recover from Progressive the entire bodily injury judgment achieved by plaintiff Bun Bun Tran against defendant Leonel Arellano as a result of Progressive's breach of its contractual and extracontractual good faith and fair dealing duties, including the good faith duty to settle and investigate all claims owed by it to Leonel Arellano when handling the Bun Bun Tran claims against Leonel Arellano.

5. In consideration of the mutual promises made herein, defendant Leonel Arellano irrevocably agrees that he has not and will not release any rights he has against Progressive without the express written consent of plaintiff Bun Bun Tran.

6. Plaintiff Bun Bun Tran reserves the unconditional right to settle with Progressive at any time under any terms and conditions and for any amount in his sole and exclusive discretion. In the event of any such settlement between Bun Bun Tran and Progressive, Bun Bun Tran will notify defendant Leonel Arellano of such settlement and will thereupon release defendant Leonel Arellano from any judgment liens and obligations under this agreement and will further cause a full satisfaction of judgment to be filed in favor of defendant Leonel Arellano in THE ACTION.

COVENANTS

In consideration of the mutual promises set forth above, plaintiff Bun Bun Tran for himself, his successors and assigns, hereby covenants as follows:

1. Following entry of judgment in favor of Bun Bun Tran and against defendant Leonel Arellano in THE ACTION, plaintiff Bun Bun Tran agrees to stay levy of execution on said judgment pending the final outcome of the bad faith case against Progressive, whether such bad faith case is filed by plaintiff Bun Bun Tran as assignee of the bad faith rights of defendant Leonel Arellano up to the bodily injury judgment rendered in favor of Bun Bun Tran against Leonel Arellano, or whether such bad faith lawsuit is prosecuted jointly by Bun Bun Tran and Leonel Arellano as described in *Cain v. State Farm* (1975) 47 Cal.App.3d 783.

2. The covenant to stay levy of execution of judgment as set forth in paragraph 1 immediately preceding shall be deemed a permanent covenant not to execute as long as Progressive does not in any way attack the legal validity of any assignment and/or covenant herein.

3. If, but only if, Progressive in any way attacks the legal validity of any such assignment and/or covenant herein, then, and until the validity of such assignment or covenant is judicially determined, such covenant shall be modified as follows:

a. The covenant shall be deemed only a temporary covenant by plaintiff Bun Bun Tran to stay execution of judgment until the final outcome of the insurance bad faith case, at which time, the judgment shall be subject to levy of execution,

b. If any assignment or covenant not to execute shall be judicially determined to invalidate, defeat, negate, mitigate or minimize defendant Leonel Arellano's cause of action against Progressive in any way or Bun Bun Tran's claims as assignee of Leonel Arellano's bad faith claims or Bun Bun Tran's contemplated complaint-in-intervention against Progressive in any way, then such covenant shall be null and void and the covenant to stay execution set forth in subparagraph a immediately preceding shall terminate as provided therein.

APPROVED AS TO FORM AND CONTENT

Dated: \_\_\_\_\_

\_\_\_\_\_  
Christopher E. Angelo  
Angelo & Di Monda, LLP  
Attorneys for Plaintiff Bun Bun Tran, by and  
through his Guardian ad Litem, Le Thi  
Nguyen

Dated: \_\_\_\_\_

\_\_\_\_\_  
James O. McLaughlin  
Winet, Patrick & Weaver  
Attorneys for Defendant Leonel Arellano

Dated: \_\_\_\_\_

\_\_\_\_\_  
Bun Bun Tran, by and through his Guardian  
ad Litem, Le Thi Nguyen

Dated: \_\_\_\_\_

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Defendant Leonel Arellano

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**PROOF OF SERVICE**

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 500 South Grand Avenue, 15th Floor, Los Angeles, CA 90071-2609.

On December 27, 2007, I served the foregoing document(s) described as:

**OPPOSITION TO MOTION TO DISMISS FOR LACK  
OF SUBJECT MATTER JURISDICTION [RULE  
12(b)(1)**

on all interested parties in this action by placing a true copy of each document, enclosed in a sealed envelope addressed as follows:

**Attorneys for Plaintiff, Bun Bun Tran**

Christopher E. Angelo, Esq.  
Joseph Di Monda, Esq.  
ANGELO & DI MONDA LLP  
1721 No. Sepulveda Boulevard  
Manhattan Beach, CA 90266-5014  
Telephone: (310) 939-0099  
Facsimile: (310) 939-0023

☐ **BY MAIL:** as follows: I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Los Angeles, California.

☐ **BY PERSONAL SERVICE:** I delivered such envelope by hand to the above addressee(s).

☒ **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to be delivered to an overnight courier service (California Overnight), for delivery to the above addressee(s).

☐ **BY FACSIMILE TRANSMISSION:** I caused the above-referenced document(s) to be transmitted to the above-named person(s) at the above facsimile number.

☐ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 27, 2007, at Los Angeles, California.

  
Windy Gale Tyler

## **EXHIBIT 3**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PROGRESSIVE WEST INSURANCE  
COMPANY, an Ohio corporation,

Plaintiff,

v.

BUN BUN TRAN, LEONEL  
ARRELLANO,


Defendants.

Civil No. 07cv1999 JAH(POR)

**ORDER VACATING HEARING  
DATE**

After a review of the pleadings and relevant exhibits submitted by the parties, this Court finds defendant's motion to dismiss [doc. #4] suitable for disposition without oral argument. *See* CivLR 7.1(d.1). Accordingly, IT IS HEREBY ORDERED that the date of January 14, 2008 set for hearing defendant's motion is VACATED. This Court will issue its ruling on the motion in due course.

Dated: January 7, 2008

  
JOHN A. HOUSTON  
United States District Judge

## **EXHIBIT 4**

JAMES R. ROBIE, SBN 67303  
KYLE KVETON, SBN 110805  
RONALD P. FUNNELL, SBN 209897  
ROBIE & MATTHAI  
A Professional Corporation  
500 South Grand Avenue, 15<sup>th</sup> Floor  
Los Angeles, California 90071  
(213) 706-8000 • (213) 624-2563 Fax  
kkveton@romalaw.com

Attorneys for Plaintiff PROGRESSIVE WEST  
INSURANCE COMPANY

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PROGRESSIVE WEST INSURANCE )  
COMPANY, an Ohio corporation, )  
Plaintiff, )  
vs. )  
BUN BUN TRAN, LEONEL )  
ARRELLANO, )  
Defendants. )

**CASE NO. 07 - CV 1999 JAH (POR)**

**REQUEST TO ENTER DEFAULT  
AGAINST DEFENDANT LEONEL  
ARRELLANO; DECLARATION OF  
RONALD P. FUNNELL**

TO: THE CLERK OF THE ABOVE-ENTITLED COURT

Plaintiff Progressive West Insurance Company ("Progressive") hereby requests that the clerk of the U.S. District Court Southern District of California enter default in this matter against defendant Leonel Arrellano on the ground that said defendant has failed to appear or otherwise respond to the complaint within the time prescribed by the Federal Rules of Civil Procedure. Plaintiff served the complaint on defendant Leonel Arrellano on November 5, 2007, evidenced by the Summons on file with this Court and attached as Exhibit A.

///

///

///



1 The above stated facts are set forth in the accompanying declaration of Ronald  
2 P. Funnell, filed herewith.

3  
4 DATED: April 8, 2008

ROBIE & MATTHAI  
A Professional Corporation

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6  
7 By: \_\_\_\_\_  
8 JAMES R. ROBIE  
9 KYLE KVETON  
10 RONALD P. FUNNELL  
11 Attorneys for Plaintiff PROGRESSIVE WEST  
12 INSURANCE COMPANY  
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**DECLARATION OF RONALD P. FUNNELL IN SUPPORT  
OF REQUEST TO ENTER DEFAULT**

I, RONALD P. FUNNELL, declare as follows:

1. I am an attorney licensed to practice law in the state of California and am an attorney with the law firm of Robie and Matthai, attorneys representing Plaintiff Progressive West Insurance Company in this case. The facts stated in this declaration are from my own personal knowledge and I would and could testify competently to these facts if called to do so.

2. Defendant Leonel Arrellano was served with the Summons and the Complaint on November 5, 2007. Attached hereto as **Exhibit A** are true and correct copies of the Summons and Complaint.

3. Defendant Leonel Arrellano has not appeared in this action and has not responded to the complaint within the 20 day time period permitted by law as provided by FRCP 12(a)(1).

4. Defendant Leonel Arrellano is not a minor nor an incompetent person. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 8<sup>th</sup> day of April 2008, at Los Angeles, California.

RONALD P. FUNNELL

1 **PROOF OF SERVICE**

2 I declare that I am over the age of eighteen (18) and not a party to this action.  
 3 My business address is 500 South Grand Avenue, 15th Floor, Los Angeles, CA  
 90071-2609.

4 On April 8, 2008, I served the foregoing document(s) described as:

5 **REQUEST TO ENTER DEFAULT AGAINST**  
 6 **DEFENDANT LEONEL ARRELLANO;**  
**DECLARATION OF RONALD P. FUNNELL**

7 on all interested parties in this action by placing a true copy of each document,  
 8 enclosed in a sealed envelope addressed as follows:

9 **Attorneys for Defendant, Bun Bun**  
**Tran:**

10 Christopher E. Angelo, Esq.  
 11 Joseph Di Monda, Esq.  
 ANGELO & DI MONDA LLP  
 1721 No. Sepulveda Boulevard  
 Manhattan Beach, CA 90266-5014  
 Telephone: (310) 939-0099  
 Facsimile: (310) 939-0023

**Defendant Leonel Arrellano, In Pro**  
**Per:**

Leonel Arrellano, Inmate #F77654  
 c/o Division of Adult Operations  
 Sierra Conversation Center  
 5100 O'Byrnes Ferry Road  
 Jamestown, CA 95327

13 (X) **BY MAIL:** as follows: I am "readily familiar" with the firm's practice of  
 14 collection and processing of correspondence for mailing with the United States  
 15 Postal Service. I know that the correspondence was deposited with the United  
 16 States Postal Service on the same day this declaration was executed in the  
 17 ordinary course of business. I know that the envelope was sealed and, with  
 postage thereon fully prepaid, placed for collection and mailing on this date in  
 the United States mail at Los Angeles, California.

18 ( ) **BY PERSONAL SERVICE:** I delivered such envelope by hand to the above  
 addressee(s).

19 ( ) **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to  
 20 be delivered to an overnight courier service (Federal Express), for delivery to  
 the above addressee(s).

21 ( ) **BY FACSIMILE TRANSMISSION:** I caused the above-referenced  
 22 document(s) to be transmitted to the above-named person(s) at the above  
 facsimile number.

23 ( ) **BY E-SERVICE:** I caused the above-referenced document(s) to be  
 24 electronically served on all counsel of record through the Court's CM/ECF  
 filing and service system.

25 (X) **(Federal)** I declare that I am employed in the office of a member of the bar  
 26 of this court at whose direction the service was made.

27 Executed on April 8, 2008, at Los Angeles, California.

28 Windy Gale Tyler

Summons in a Civil Action (Rev 11/97)

**United States District Court**  
SOUTHERN DISTRICT OF CALIFORNIA

Progressive West Insurance Company, an Ohio Corporation

vs

Bun Bun Tran, Leonel Arrellano

**SUMMONS IN A CIVIL ACTION**

Case No. **07 CV 1999 JAH (POR)**

Document 9-2 Filed 04/08/2008 Page 1 of 1  
ON COMPLAINT FOR DECLARATORY  
RELIEF

TO: (Name and Address of Defendant)

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon  
PLAINTIFF'S ATTORNEY

James R. Robie,  
Robie & Matthai  
500 South Grand Avenue, Suite 1500,  
Los Angeles, CA 90071

An answer to the complaint which is herewith served upon you, within twenty days after  
service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by  
default will be taken against you for the relief demanded in the complaint.

W. Samuel Hamrick, Jr.

CLERK

**P. DELACRUZ**

By \_\_\_\_\_, Deputy Clerk

**OCT 16 2007**

DATE

Summons in a Civil Action

\\ODMA\PCDOCS\WORDPERFECT\14443\1 May 5, 1999 (11:34am)

4  
Exh. A

**EXHIBIT A**

AO-443S

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## RETURN OF SERVICE

Service of the Summons and Complaint was made by me

DATE

NAME OF SERVER

TITLE

Check one box below to indicate appropriate method of service

☐

Served personally upon the defendant. Place where served: \_\_\_\_\_

☐

Left copies thereof at the defendant's dwelling, house or usual place of abode with a person of suitable age and discretion then residing therein: \_\_\_\_\_

Case 3:07-cv-01999-JAH-POR Document 9-2 Filed 04/08/2008 Page 2 of 1

Name of person with whom the summons and complaint were left: \_\_\_\_\_

☐

Return unexecuted: \_\_\_\_\_

☐

Other (specify): \_\_\_\_\_

## STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL

## DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service is true and correct.

Executed on: \_\_\_\_\_

Date

Signature of Server

Address of Server

NOTICE OF RIGHT TO CONSENT TO TRIAL BY A UNITED STATES MAGISTRATE

IN ACCORDANCE WITH THE PROVISION OF 28 USC 636(C) YOU ARE HEREBY NOTIFIED THAT A U.S. MAGISTRATE OF THIS DISTRICT MAY, UPON THE CONSENT OF ALL PARTIES, CONDUCT ANY OR ALL PROCEEDINGS, INCLUDING A JURY OR NON-JURY TRIAL, AND ORDER THE ENTRY OF A FINAL JUDGMENT. COUNSEL FOR THE PLAINTIFF HAS RECEIVED A CONSENT FORM.

YOU SHOULD BE AWARE THAT YOUR DECISION TO CONSENT OR NOT CONSENT IS ENTIRELY VOLUNTARY AND SHOULD BE COMMUNICATED SOLELY TO THE CLERK OF COURT. ONLY IF ALL PARTIES CONSENT WILL THE JUDGE OR MAGISTRATE TO WHOM THE CASE HAS BEEN ASSIGNED BE INFORMED OF YOUR DECISION.

JUDGMENTS OF THE U.S. MAGISTRATES ARE APPEALABLE TO THE U.S. COURT OF APPEALS IN ACCORDANCE WITH THIS STATUTE AND THE FEDERAL RULES OF APPELLATE PROCEDURE.

1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure

\\ODMA\PCDOCS\WORDPERFECT\14443\1 May 5, 2008 (11:34am)

COPY

1 ROBIE & MATTHAI  
A Professional Corporation  
2 JAMES R. ROBIE, SBN 67303  
KYLE KVETON, SBN 110805  
3 RONALD P. FUNNELL, SBN 209897  
500 South Grand Avenue, 15<sup>th</sup> Floor  
4 Los Angeles, California 90071  
(213) 706-8000 • (213) 624-2563 Fax  
5 [kkveton@romalaw.com](mailto:kkveton@romalaw.com)

FILED

07 OCT 16 PM 1:39

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

6 Attorneys for Plaintiff PROGRESSIVE WEST INSURANCE COMPANY Document 9-2 Filed 04/08/2008 Page 3 of 1

7  
8  
9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 PROGRESSIVE WEST INSURANCE  
12 COMPANY, an Ohio corporation,

13 Plaintiff,

14 vs.

15 BUN BUN TRAN, LEONEL  
ARRELLANO,

16 Defendants.  
17

07 CV 1999 JAH (POR)  
CASE NO.:

COMPLAINT FOR  
DECLARATORY RELIEF

18 Plaintiff Progressive West Insurance Company ("Progressive") alleges:

19 1. Plaintiff is and was at all times mentioned a corporation incorporated  
20 under the laws of the State of Ohio and having its principal place of business in the  
21 State of Ohio.

22 2. Defendant Bun Bun Tran ("Mr. Tran") is and was at all times mentioned  
23 an individual residing in the State of California, County of San Diego.

24 3. Defendant Leonel Arrellano ("Mr. Arrellano") is and was at all times  
25 mentioned an individual residing in the State of California.

26 4. The jurisdiction of this Court over the subject matter of this action is  
27 predicted on 28 U.S.C § 1332. The amount in controversy exceeds \$75,000.00,  
28 exclusive of interest and costs. In determining the amount in controversy for

K:\M461-Pleading\Complaint Dec Relief.wpd

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COMPLAINT FOR DECLARATORY RELIEF

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Exh. A

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1 jurisdictional purposes, general, special, and punitive damages are to be considered if  
2 recoverable. *See, e.g., Watson v. Blankinship*, 20 F.3d 383, 386-87 (10th Cir. 1994);  
3 *Smith v. Bally's Holiday*, 843 F. Supp. 1451 (N.D. Ga. 1994); *Srouer v. Barmes*, 670  
4 F.Supp. 18 (D.D.C. 1987). Based on the facts alleged below, it is legally certain that  
5 defendant's claim against Progressive exceeds \$75,000.00. Therefore, although  
6 Progressive disputes liability, Progressive asserts that the amount in controversy  
7 exceeds \$75,000.00 and that this Court has jurisdiction over this action.

8 5. Venue is proper, as the Southern District of California is the district in  
9 which a substantial part of the events or omissions on which the claim is based  
10 occurred.

11 6. For the policy period May 30, 2006 to November 30, 2006, plaintiff  
12 Progressive insured defendant Leonel Arrellano ("Mr. Arrellano") under California  
13 Motor Vehicle Policy number 16558999-00. The policy contained a per-person  
14 bodily injury liability limit of \$15,000.

15 7. On November 18, 2006, at 1:05 a.m., defendant Bun Bun Tran was  
16 driving his automobile eastbound on Juniper Street in the City of San Diego.

17 8. At the same time, Defendant Mr. Arrellano was driving his pickup truck  
18 south bound on Commonwealth Avenue in the City of San Diego.

19 9. Mr. Arrellano's pickup truck collided with Mr. Tran's automobile. The  
20 subsequent traffic collision report assigned fault to Mr. Arrellano for disregarding a  
21 stop sign.

22 10. As a result of the collision, Mr. Tran suffered serious injuries including  
23 head trauma described as a subarachnoid hemorrhage and a ruptured spleen. Mr.  
24 Tran reportedly remains comatose.

25 11. Mr. Tran's medical bills are believed to be in excess of \$700,000.00.

26 12. Following the accident, Mr. Arrellano was arrested by the San Diego  
27 Police Department for driving under the influence of alcohol, driving without a  
28 licence and leaving the scene of an accident. In February 2007, Mr. Arrellano pled



1 guilty to violation of Vehicle Code §20001(a) (leaving scene of an accident) and  
2 §23153(b) (driving under the influence of alcohol and causing bodily injury to  
3 another.) Mr. Arrellano remained in the San Diego County Jail until June 2007, when  
4 he was sentenced to 6 years in a California prison.

5 13. On or about January 26, 2007, attorney Anh Quoc Duy Nguyen wrote  
6 Progressive demanding that Progressive tender its liability policy limits within fifteen  
7 (15) days. A copy of attorney Nguyen's demand letter is attached as Exhibit 1. Page 5 of 1

8 14. Plaintiff is informed and believes that at the time Attorney Nguyen sent  
9 his January 26, 2007 letter, he was not legally representing Bun Bun Tran, but,  
10 instead, was representing Mr. Tran's mother. Plaintiff is further informed and  
11 believes that Mr. Tran's mother was not then guardian ad litem of Mr. Tran. As a  
12 result, Attorney Nguyen had no legal authority to settle the claims of Mr. Tran, nor  
13 did he have legal authority to release claims of Mr. Tran against any tortfeasor.

14 15. Attorney Nguyen's demand did not offer a release or dismissal in  
15 exchange for payment of the insurance benefits, and, indeed, it specifically was  
16 subject to the condition precedent "of convincing me [Nguyen] that there are no other  
17 responsible parties, whether insured or not, causing this accident. If I am convinced,  
18 I will state as much in a letter. If I am not convinced, I will never state as much in a  
19 letter and there will be no settlement."

20 16. It was legally and factually impossible to convince Attorney Nguyen that  
21 there were no other responsible parties for causing this accident, given the facts and  
22 circumstances of the accident, and that Patricia Cole in fact paid Bun Bun Tran  
23 \$300,000 to settle the liability claim against her arising from this accident in July  
24 2007.

25 17. As a result of the above condition precedent, attorney Nguyen's demand  
26 was not an offer to settle within the policy's limits. Rather, the condition precedent  
27 of "convincing" Nguyen was outside of the policy and its stated limits.

28 18. In response to attorney Nguyen's letter, Progressive offered its policy



limits on February 2, 2007, within seven days of the demand. Attorney Nguyen rejected the offer and referred Mr. Tran's claim to attorney Christopher Angelo.

19. On or about May 8, 2007, attorney Angelo filed a lawsuit on behalf of Mr. Tran (through his guardian ad litem, Le Thi Nguyen), entitled *Bun Bun Tran vs. Arrellano, et al.*, San Diego Superior Court Case No. 37-2007-00065432-CU-PA-CTL. The complaint alleges causes of action for negligence and negligence per se against Mr. Arrellano.

20. The correspondence, pleadings and discovery proceedings in the above captioned lawsuit make clear that attorney Angelo intends to obtain a judgment against Mr. Arrellano and then sue Progressive on behalf of Mr. Tran for breach of contract and breach of the implied covenant of good faith and fair dealing for failure to settle Mr. Tran's claim within policy limits.

21. Attorney Angelo has accused Progressive of misconduct and claims that Progressive's failure to accept Attorney Nguyen's January 26, 2007 policy limits demand has eliminated the stated limits of the policy. As a result of the erroneous contention that Progressive has "taken the lid off its policy" by not accepting Attorney Nguyen's conditional demand of January 26, 2007, Mr. Tran claims, *inter alia*, that a conflict of interest has arisen between Progressive's defense counsel and Mr. Arrellano, that Mr. Arrellano should stipulate to a multi-million dollar judgment and that Progressive should bear liability for these extracontractual claims. A copy of the letter of June 28, 2007, from Mr. Tran's attorney is here attached as Exhibit 2. Progressive denies and disputes these allegations and contends it has not rejected a settlement within policy limits which would lead to such consequences claimed by defendant Mr. Tran.

22. An actual controversy has arisen and now exists between the parties relating to the legal rights and duties of plaintiff and defendants under the involved policy of insurance, for which plaintiff desires a declaration of rights.

23. A declaratory judgment is necessary in that plaintiff contends it

1 discharged its obligations under the insurance policy and in accord with California  
 2 law and that its conduct in response to the letter of attorney Nguyen (Exhibit 1) did  
 3 not eliminate or jeopardize the \$15,000 policy limits available on the contract at  
 4 issue.

5  
 6 Wherefore, plaintiff prays for a declaratory judgment against defendants as  
 7 follows:

- 8 1. That the Court declare the respective rights and duties of plaintiff and
- 9 defendants under the involved policy of insurance;
- 10 2. That plaintiff be awarded its costs, expenses and attorney fees incurred
- 11 herein; and
- 12 3. For other such relief as the Court deems just and proper.

13  
 14 DATED: October 5, 2007

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ROBIE & MATTHAI  
 A Professional Corporation

By: \_\_\_\_\_

JAMES R. ROBIE  
 KYLE KVETON  
 RONALD P. FUNNELL  
 Attorneys for Plaintiff PROGRESSIVE WEST  
 INSURANCE COMPANY

Case 3:07-cv-01999-JAH-POR Document 9-2 Filed 04/08/2008 Page 8 of 1

# EXHIBIT 1

01/26/2007 FRI 3:23 PM 1/14/07 5591 ANH DUY NGUYEN &amp; ASSOC

01/26/2007

LAW OFFICES OF  
ANH QUOC DUY NGUYEN & ASSOCIATES

Branch Offices:

SAN GABRIEL  
1015 E. LAS TUNAS DRIVE  
SAN GABRIEL, CA 91778  
PHONE: (626) 286-2239  
  
SAN DIEGO  
4745 EL CAJON BLVD., SUITE 101  
SAN DIEGO, CA 92126  
PHONE: (619) 284-0800

15622 BROOKHURST STREET  
WESTMINSTER, CALIFORNIA 92683

PHONE: (714) 531-8181  
FAX: (714) 531-9397

RESPOND TO:

■ WESTMINSTER OFFICE  
□ SAN GABRIEL OFFICE  
□ SAN DIEGO

January 26, 2007 Case 3:07-cv-01999-JAH-POR Document 9-2 Filed 04/08/2008 Page 9 of 1

Tiara Foster, Claims Representative  
Progressive Insurance Company  
6131 Orangethorpe Avenue, Suite 300  
Buena Park, CA 90620  
714.736.6300 general phone  
714.736.6321 direct  
714.736.6308 fax

Via Certified Mail with Return Receipt  
and Fax to: (714)736-6308

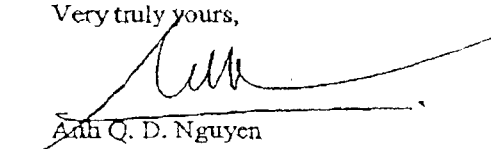
Re:	My Client:	Bun Bun Tran
	Your Insured/Defendant:	Leonel Arrellano
	Date of Accident:	November 18, 2006
	Your Claim No.:	060409287

Dear Ms. Foster:

Please be advised that I represent Bun Bun Tran, who was seriously injured because of your insured running a stop sign. Thereafter, your insured fled from the scene. He has been arrested and is currently awaiting a criminal hearing in February of this year. My client has been hospitalized at UC San Diego, Floor 8 East, Room 812A, in a comatose condition since November 18, 2006. I understand that you have learned about his condition and the facts behind this accident from Esurance, the auto insurance company of Bun Bun Tran. You therefore know that the medical expenses are approaching \$700,000 and Progressive has insufficient amounts of liability insurance.

My client is represented by his mother/guardian, Le Thi Nguyen. My client is hereby willing to be responsible for any and all medical and other liens so long as Progressive tenders all of its liability limits within 15 days from the date of this letter subject to the further condition precedent of convincing me that there are no other responsible parties, whether insured or not, causing this accident. If I am convinced, I will state as much in a letter. If I am not convinced, I will never state as much in a letter and there will be no settlement. Please also tell me, since it may bear on settlement, whether or not your insured received liquor at a Chili's restaurant shortly before the accident, and if so, which Chili's restaurant. We understand that Chili's was your insured's employer at the time of the accident.

Very truly yours,

  
Anh Q. D. Nguyen

Case 3:07-cv-01999-JAH-POR Document 9-2 Filed 04/08/2008 Page 10 of

# EXHIBIT 2

ANGELO & DI MONDA

A LIMITED LIABILITY PARTNERSHIP

1721 NORTH SEPULVEDA BOULEVARD  
MANHATTAN BEACH, CALIFORNIA 90266

CHRISTOPHER E. ANGELO  
JOSEPH DI MONDA, A.I.A.

TELEPHONE: (310) 939-0000  
FACSIMILE: (310) 939-0023

June 28, 2007

Case 3:07-cv-01999-JAH-POR Document 9-2 Filed 04/08/2008 Page 11 of

James O. McLaughlin  
Winet, Patrick & Weaver  
401 West A Street, Suite 1400  
San Diego, CA 92101  
619.702.3902  
619.702.5432 fax

Re: *Bun Bun Tran v. Leonel Arrellano, et al.*  
Your File No. P21084

Dear Mr. McLaughlin:

I assume that you have requested and reviewed all correspondence exchanged between the two claims adjusters from Progressive and the law office of Anh Nguyen. Pursuant to that review by you, I assume you and your primary client, Mr. Arrellano, are ready to consider demanding certain settlement parameters, as follows:

1. Leonel Arrellano and his liability insurer, Progressive, stipulate to Arrellano's liability and as to the amount of reasonable damages (assuming a reasonable stipulation) relative to the above matter.
2. In exchange, my client agrees not to execute any judgment against Mr. Arrellano, so long as Progressive consents to this arrangement without any reservation. Future wrongful death claims will also be waived.
3. Progressive agrees to pay the entirety of that stipulated judgment, subject to any offset or reimbursement from cross-complaint recoveries achieved by your firm against the City of San Diego and/or Chili's Grill & Bar.
4. You will not have the benefit of any cross-complaint recovery against co-defendant Patricia Cole because a settlement has been achieved between attorney Anh Nguyen and First American in light of their very professional conduct.

JUL 02 2007

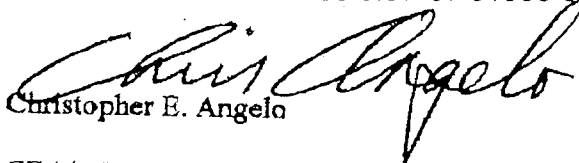
ANGELO & DI MONDA  
A LIMITED LIABILITY PARTNERSHIP

I am open to any other parameters suggested by you in writing. The parameters suggested by me in this letter will remain open for the next 30 days, at which time all settlement negotiations will be withdrawn.

Very truly yours,

ANGELO & DI MONDA, LLP

Case 3:07-cv-01999-JAH-POR Document 9-2 Filed 04/08/2008 Page 12 of

  
Christopher E. Angelo

CEA/csh

PAGE 05

11/06/2007 13:34 2095325180  
UNIVERSITY (Name and Address):

MONAGHAN ATTNV SVCS

<b>Robie &amp; Matthai</b> <b>James Robie, 67303</b> <b>500 S. Grand Ave., 15th Floor</b> <b>Los Angeles, CA 90071-2614</b>		TELEPHONE NO.: <b>(213) 624-3062</b>		FOR COURT USE ONLY	
ATTORNEY FOR (Name): <b>Plaintiff</b>		Ref. No. or File No. <b>Progressive</b>			
Insert name of court, judicial district or branch court, if any: <b>UNITED STATES DISTRICT COURT</b> <b>SOUTHERN DISTRICT</b>					
PLAINTIFF: <b>Progressive West Inc.</b>					
DEFENDANT: <b>Bun Bun Tran, et al.,</b>					
<b>PROOF OF SERVICE</b>		DATE:	TIME:	DEPT/DIV:	CASE NUMBER: <b>07CV 1999 JAH (POR)</b>

AT THE TIME OF SERVICE I WAS AT LEAST 18 YEARS OF AGE AND NOT A PARTY TO THIS ACTION, AND I SERVED COPIES OF THE:

Summons, Complaint, Civil Cover Sheet, Certificate & Notice of Interested Parties

PARTY SERVED: **Leonel Arrellano, Inmate #F77654**

DATE & TIME OF DELIVERY:

ADDRESS, CITY, AND STATE: **5100 O'Byrnes Ferry Road**  
 (BUSINESS) **Jamestown, CA 95327**

MANNER OF SERVICE:

**Personal Service - By personally delivering copies.**

*Beverly Monaghan*  
 Registered California process server.  
 County: **Tuolumne**  
 Registration No.: **13**  
**Los Angeles Legal Service**  
**2107-D West Commonwealth Ave., #**  
**380**  
**Alhambra, CA 91803**  
**(626) 289-0179**

I declare under penalty of perjury under the laws of the State of California that the foregoing information contained in the return of service and statement of service fees is true and correct and that this declaration was executed on **October 30, 2007** at **Alhambra, California**.

Signature: *Beverly Monaghan*

**PROOF OF SERVICE**

Order #: S2329/0Proof1

#2(a)(23)(New July 1, 1997)





## **EXHIBIT 5**

Christopher E. Angelo [70007]  
Joseph Di Monda [184640]  
ANGELO & DI MONDA, LLP  
1721 N. Sepulveda Blvd.  
Manhattan Beach, California 90266-5014  
Telephone: 310-939-0099  
Fax: 310-939-0023

Attorneys for Defendants, Bun Bun Tran and Le Thi Nguyen

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PROGRESSIVE WEST INSURANCE  
COMPANY, an Ohio corporation,

Plaintiffs,

v.

BUN BUN TRAN, LEONEL  
ARRELLANO,

Defendants.

NO. 07- CV 1999 JAH (POR)

**NOTICE OF MOTION AND  
MOTION BY BUN TRAN TO SET  
ASIDE ENTRY OF DEFAULT ON  
DEFENDANT LEONEL  
ARRELLANO: REQUEST TO  
APPOINT COUNSEL FOR  
ARRELLANO IN THIS MATTER;  
DECLARATION OF JOSEPH DI  
MONDA, ESQ.; DECLARATION OF  
CHRISTOPHER E. ANGELO, ESQ.**

Time: 2:30 p.m.  
Date: May 27, 2008  
Ct. No.: 11  
880 Front Street  
San Diego, CA 92101

**TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on May 27, 2008, at 2:30 p.m., or as soon  
thereafter as the matter may be heard in the above-entitled court, located at 880 Front  
Street, San Diego, CA 92101, defendant and real party in interest Bun Bun Tran, by and  
through his guardian ad litem Le Thi Nguyen, will move the court to set aside plaintiff's  
Entry of Default against defendant Leonel Arrellano pursuant to FRCP 55(c) for good

1 cause shown because: 1) Bun Tran has filed a Motion to Dismiss this Complain for lack  
2 of diversity jurisdiction pursuant to FRCP 12(b)(1); 2) defendant Arrellano is an indigent  
3 prisoner incarcerated in the Sierra Conversation Center; 3) defendant Leonel Arrellano is  
4 without counsel in this matter; and 4) a fraud is being perpetrated upon this Court by  
5 Progressive Insurance Company which refuses to pay for Arrellano's defense in this  
6 action even though it knows Arrellano is incarcerated, does not speak, read or understand  
7 English and cannot defend himself. By entering this default, Progressive is attempting to  
8 avoid this Court's ruling on Bun Tran's Motion to Dismiss.

9 The motion will be based upon this Notice of Motion and Motion, the  
10 Memorandum of Points and Authorities filed herewith, the Declaration of Christopher E.  
11 Angelo, Esq., and the pleadings and papers filed herewith.

12  
13 Dated: April 9, 2008

ANGELO & DI MONDA, LLP

14  
15  
16 By: \_\_\_\_\_  
17 Joseph Di Monda  
18 Attorneys for Defendants,  
19 Bun Bun Tran and Le Thi Nguyen  
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1 **I. INTRODUCTION**

2 Defendant Leonel Arrellano ("Arrellano") is an indigent illegal alien who does not  
3 speak, read or understand English. Declaration of Christopher E. Angelo, Esq. Arrellano  
4 catastrophically injured Bun Tran ("Tran") when their vehicles collided. Arrellano is  
5 incarcerated in northern California for driving while intoxicated and leaving the scene of  
6 an accident. Arrellano had a \$15,000 automobile insurance policy with plaintiff  
7 Progressive West Insurance Company ("Progressive"). The damages caused by Arrellano  
8 will exceed \$40 million dollars.

9 Progressive rejected Tran's policy limit demand which would have dismissed all  
10 claims against the world for Arrellano's \$15,000 liability policy limits. It is Tran's  
11 position that Progressive is now responsible to indemnify Arrellano for an unlimited  
12 amount of potential damages due to Progressive's failure to settle for Arrellano's policy  
13 limits. Progressive denies it rejected Tran's policy limit demand. Tran filed a personal  
14 injury lawsuit against Arrellano, Chili's Restaurant and other third parties in San Diego  
15 Superior Court, Case number 37-2007-00065432-CU-PA-CTL, Dept. C-62, the Hon.  
16 Ronald L. Styn, Judge, ("the State Action"). Decl. of Christopher E. Angelo, Esq.

17 Progressive has filed this sham Declaratory Relief action in this Court attempting  
18 to vest this Court with jurisdiction to declare that it has not committed bad faith when it  
19 rejected Tran's policy limit demand. Progressive's federal action is a sham pleading  
20 designed to attempt to evade California bad faith law.

21 On or about November 24, 2007, Tran moved to dismiss this federal action for  
22 lack of diversity jurisdiction. The parties completed briefing on or about January 2, 2008.

23 On January 7, 2008, this Court Ordered that the oral arguments on Tran's motion  
24 to dismiss be vacated and that the Court would issue its ruling on Tran's Motion to  
25 Dismiss in due course. Arrellano never made an appearance in this federal action.

26 Arrellano's Progressive paid lawyers in the State Action claim that they requested  
27 that Progressive pay them to represent Arrellano in this federal action. According to  
28 Arrellano's State Action lawyers, Progressive has refused to pay for Arrellano's defense

costs. Decl. of Joseph Di Monda, Esq.

Progressive now files a Notice of Entry of Default against its own incarcerated and indigent insured Arrellano for his failure to make an appearance in this matter.

Progressive knows that the reason Arrellano has not made an appearance is because he has no money to pay for a lawyer, cannot read the complaint, and does not know what it means even if he could read the complaint. Had Progressive been instead the State of California, the latter would have been required to pay for Arrellano's appearance. *Compare, Payne v. Sup. Ct.* (1976) 17 Cal.3d 908.

By this Notice of Entry of Default, Progressive attempts to do an end run around this Court's decision on Tran's Motion to Dismiss and on this Court deciding the merits of Progressive's claims against Arrellano and Tran if it decides it has jurisdiction.

Tran is a defendant in this action although he is actually a real party in interest and has been negotiating with Arrellano's State Action lawyers for an assignment of Arrellano's bad faith rights against Progressive. Decl. of Christopher E. Angelo, Esq.

Tran has a property interest in Arrellano's Assets, including his bad faith rights.

## **II. GOOD CAUSE EXISTS TO SET ASIDE THE NOTICE OF ENTRY OF DEFAULT**

### **A. Arrellano is an Indigent Who Cannot Read or Speak English and is Without Legal Counsel**

"The court may set aside an entry of default for good cause . . ." Fed. Rule of Civ. Proc., Rule 55(c). Defendant's culpability in allowing default is relevant consideration in determining whether to grant motion to set aside default. *Farnese v. Bagnasco* (1982) 687 F.2d 761. This rule providing that an entry of default may be set aside for good cause shown vests in the federal district courts a broad discretion to set aside an entry of default in order to accomplish justice. *Schartner v. Copeland* (1973) 59 F.R.D. 653, affirmed 487 F.2d 1395.

Here, Arrellano is an indigent illegal alien who does not speak, read or understand English and required an interpreter at his deposition. Decl. of Christopher E. Angelo, Esq.

Arrellano is being sued by his own insurance carrier who knows Arrellano is indigent and refuses to pay for Arrellano's defense in this action. Progressive also knows that Arrellano cannot read, speak or understand English and has no way of defending himself.

Progressive, by refusing to pay for Arrellano's defense has created a situation by which it may avoid its legal obligation to pay for its bad faith by obtaining a default against him. This would permit Progressive to avoid bad faith liability and place the responsibility for Progressive's bad faith back on Arrellano.

A declaratory relief action cannot be filed if it means that the insurer has abandoned, compromised or rejected the insured's claim, presumably a claim for overlimits bad faith. *Atlas Assur. Co. v. LTD McCombs* (1983) 146 Cal.App.3d 135, 150.

This Court should not permit such obvious unethical and possibly illegal behavior to stand.

B. Progressive Has Sued its Indigent Non-English Speaking Insured,  
Intentionally Refuses to Pay for His Defense and Attempts to Take His  
Default

While Progressive pays for Arrellano's defense in the State Action, it sues him in federal court and refuses to pay for his defense. Arrellano's State Action attorney, Randy Winet, requested that Progressive pay his law firm to defend Arrellano in this federal action. According to conversations with Randy Winet, Progressive has refused to provide Arrellano with a defense. Decl. of Joseph Di Monda

Progressive knows that it has committed bad faith and is now using the fact that its insured is indigent to leave him without a defense in this action.

C. Progressive is Attempting to Use This Federal Action to Avoid State Bad  
Faith Litigation: Progressive Should Be Order to Pay for Arrellano's  
Defense

Progressive files this federal action, knowing that Arrellano cannot defend himself, refuses to pay for his defense of this lawsuit, and then takes his default. Progressive and its attorneys stoop to new lows in engaging in what should be called unethical conduct.

1 If this Court lets the default stand, Progressive avoids litigating on the merits of its  
2 bad faith refusal to pay the \$15,000 insurance limits and also makes Arrellano responsible  
3 for Progressive's bad faith.

4 D. There Would be No Prejudice to Progressive by Setting Aside its Notice of  
5 Entry of Default

6 Under subd. (c) of this rule, the principal factors bearing on the appropriateness of  
7 relieving a party of a default are whether the default was willful, whether setting it aside  
8 would prejudice the adversary, and whether a meritorious defense is presented. *Meehan v.*  
9 *Snow* (1981) 652 F.2d 274.

10 It may not be assumed that Arrellano's failure to make an appearance is willful.  
11 Arrellano was served with the Notice of Entry of Default while incarcerated in the Sierra  
12 Conservation Center. Since Arrellano is an indigent illegal alien who does not speak, read  
13 or understand English, there is a distinct possibility that Arrellano is not even aware of his  
14 responsibility to make an appearance, how to make an appearance, who to get to make an  
15 appearance, what a default notice means or how to respond to a Notice of Entry of Default.

16 Since Tran is the real party in interest, he has moved to dismiss this federal action  
17 for lack of diversity jurisdiction. Since this Court has not yet ruled on Tran's Rule  
18 12(b)(1) motion nothing has transpired in this case. No discovery has been conducted in  
19 this matter. Therefore, Progressive may not claim any prejudice.

20 If this Court grants Tran's Motion to Dismiss, it would also include the complaint  
21 against Arrellano, thereby rendering the Notice of Entry of Default moot.

22 If this Court denies Tran's Motion to Dismiss, the matter may proceed with all  
23 parties and with no prejudice to Progressive.

24 E. Arrellano has Meritorious Defenses Which Will be Raised if This Action  
25 Goes Forward

26 It takes only one valid defense to void a default termination. *Dynalectron Corp.*  
27 *(Pacific Division) v. U. S.* (1975) 518 F.2d 594, 207 Ct.Cl. 349.

28 If a defendant raises any defense cognizable at law, it is deemed to have presented a



meritorious defense, for purposes of determining whether the defendant should be granted relief from a default judgment. *Simmons v. Ohio Civil Service Emp. Assoc.* (2003) 259 F.Supp.2d 677.

Progressive's federal complaint for declaratory relief is asking this Court to declare that it did not commit bad faith and that it did not eliminate the \$15,000 policy limit.

Tran's position is that Progressive is liable for all amounts which Arrellano may be adjudged to owe Tran. Hence, Tran is negotiating with Arrellano to obtain an assignment of Arrellano's bad faith rights against Progressive.

Given the fact that Arrellano, as an indigent illegal alien, would not have sufficient assets to satisfy any judgment against him Tran has a real interest in protecting Arrellano's bad faith rights and assignment thereof.

Tran would raise the fact that Progressive had the opportunity to settle this matter for the \$15,000 policy limits and refused. Decl. of Christopher E. Angelo, Esq. Tran would present evidence in the form of letters to Progressive asking it to tender Arrellano's \$15,000 liability policy along with letters from Progressive wherein Progressive refused to tender Arrellano's policy limits. Decl. of Christopher E. Angelo, Esq.

Tran will also raise the issue that a declaratory relief action cannot be filed if it means that the insurer has abandoned, compromised or rejected the insured's claim, presumably a claim for overlimits bad faith. *Atlas Assur. Co. v. LTD McCombs* (1983) 146 Cal.App.3d 135, 150. Here, Progressive has rejected Tran's demand.

Arrellano would have the same defenses and documentation of Progressive's bad faith refusal to tender his policy limits as Tran.

Therefore, while Arrellano would remain as a defendant, Tran would carry the defense of this action and raise all appropriate defenses to Progressive's claims.

F. This Court Should Appoint Counsel for Arrellano: Alternatively, This Court Should Order Progressive to Pay for Arrellano's Defense, Or Request Tran's Counsel to Obtain a Civil Attorney for Arrellano

District courts have discretionary power to appoint counsel for persons unable to

1 pay for private attorney in both criminal and civil cases. *Vicet v. I.N.S.* (1990) 757 F.Supp.  
2 646.

3 Moreover, "28 U.S.C. § 1915, by its terms, authorizes the appointment of counsel  
4 in civil actions." *U. S. ex rel. Gardner v. Madden* (9<sup>th</sup> Cir. 1965) 352 F.2d 792, 793.

5 Here, Progressive sues its own insured, an incarcerated indigent, and refuses to pay  
6 for his defense, thereby forcing him to default. At the same time, Arrellano's State Action  
7 attorney abandons him and permits him to default.

8 Additionally, "The insurers' obligations are ... rooted in their status as purveyors of  
9 a vital service labeled quasi-public in nature. Suppliers of services affected with a public  
10 interest must take the public's interest seriously, where necessary placing it before their  
11 interest in maximizing gains and limiting disbursements ... (A)s a supplier of a public  
12 service ... the obligations of insurers go beyond meeting reasonable expectations of  
13 coverage. The obligations of good faith and fair dealing encompass qualities of decency  
14 and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out  
15 as fiduciaries, and with the public's trust must go private responsibility consonant with that  
16 trust." *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820.

17 Hence, this Court may exercise its discretion to appoint civil counsel for Arrellano.

18 Alternatively, this Court may request Tran's Counsel to locate a civil attorney for  
19 Arrellano. Tran's counsel will undertake such a duty for Arrellano.

20 G. There Is A Conflict of Interest Between Arrellano's State Action Lawyers  
21 and Chili's Restaurant Which May be the Reason Arrellano's Lawyers Are  
22 Not Representing Arrellano In This Matter And Permitted His Default to Be  
23 Taken

24 It is Tran's position that Arrellano's Progressive paid lawyers, Winet, Patrick &  
25 Weaver, are in collusion with both Progressive and Chili's Restaurant's insurance carrier.  
26 Winet, Patrick & Weaver also represent Chili's insurance carrier..

27 Arrellano testified that Winet, Patrick & Weaver told Arrellano that Winet, Patrick  
28 & Weaver also represents Chili's Restaurant's insurance carrier in other cases. Exhibit 1.

1 Oct. 3, 2007 Deposition Transcript of Leonel Arellano, p. 92, lns. 8-25, p. 93, lns. 1-15.

2 Chili's Restaurant is a defendant in the State Action. If Progressive, in collusion  
3 with Winet, Patrick & Weaver, can deny Arellano the opportunity to defend himself in  
4 this federal action and take his default, then Progressive will be found to not have any  
5 extra-contractual liability to Arellano which may be assigned to Tran.

6 Similarly, Winet, Patrick & Weaver gets to protect Chili's by having Arellano take  
7 the blame for the entire accident.

8 This is evidenced by the fact that Chili's Restaurant propounded Requests for  
9 Admissions upon Arellano which ask for legal conclusions and are compound. Exhibit 2,  
10 Chili's Restaurant's Requests for Admissions (Set Two) Propounded upon Leonel  
11 Arellano. Despite the objectionable nature of Chili's discovery, Winet, Patrick & Weaver  
12 had Arellano admit to the legal conclusions, without objections, within 12 calender days  
13 of them being mailed instead of the allowable 35 days. Exhibit 3, Leonel Arellano's  
14 Responses to Chili's Requests for Admissions, (Set Two). This is so that Chili's  
15 Restaurant may file a Motion for Summary Judgment in the San Diego Superior Court  
16 using Arellano's admissions as the basis for its argument that Chili's is not liable as a  
17 matter of law. Two days after Chili's Restaurant received Arellano's Admissions, it filed  
18 a Motion for Summary judgment using Arellano's Admissions as the basis for its  
19 arguments. Decl. of Joseph Di Monda. One would think if Chili's could draft a MSJ that  
20 fast it had advance knowledge of what Arellano's lawyer would have him admit.

21 This would leave Arellano with just a \$15,000 insurance policy and no  
22 contribution from Chili's Restaurant. It is Tran's position that this Notice of Entry of  
23 Default, is just part of the scheme by Progressive, Chili's Restaurant's insurance carrier  
24 and Winet, Patrick & Weaver to have Arellano take responsibility for the entire judgment.

25 **III. PROGRESSIVE'S NOTICE OF ENTRY OF DEFAULT IS A BLATANT**  
26 **ATTEMPT TO DIVEST THIS COURT OF ITS RIGHT AND OBLIGATION**  
27 **TO RULE ON TRAN'S MOTION TO DISMISS PROGRESSIVE'S**  
28 **COMPLAINT**

1 In response to Progressive's Complaint, Tran filed a Motion to Dismiss. While this  
2 Court ponders the parties arguments with respect to diversity jurisdiction, Progressive  
3 takes Arrellano's default, thereby attempting to divest this Court of deciding the matter  
4 and permitting Progressive to subsequently argue that since Arrellano defaulted, there is  
5 no need for this Court to rule on Tran's motion to dismiss.

6 While Progressive's scheme is intriguing, it permits Progressive to benefit from a  
7 situation it created. To wit, Progressive set up a no-lose situation for itself. It knows  
8 Arrellano cannot defend itself, it knows Arrellano has no money, it refuses to pay  
9 Arrellano's State Action lawyer to defend him, it knows it committed bad faith, so it files a  
10 sham federal complaint and instead of waiting for this Court to decide the jurisdictional  
11 issues, it takes its own insured's default. Thereby attempting to render the State bad faith  
12 action against it moot.

13 No court should let a scheme like that stand.

14 **IV. CONCLUSION**

15 For the above stated reasons, Tran requests that this motion to set aside the Notice  
16 of Entry of Default be granted.

17  
18 April 9, 2008

19 ANGELO & DI MONDA, LLP

20  
21  
22 Joseph Di Monda  
23 Attorneys for Bun Tran  
24  
25  
26  
27  
28

**DECLARATION OF CHRISTOPHER E. ANGELO, ESQ.**

I. Christopher E. Angelo, declare.

1. I am over the age of 18 years, I have personal knowledge of the facts stated herein and if called as a witness I would and could competently testify as follows;

2. I am an attorney at law duly admitted to practice before all the courts of the State of California, the United States District Court for the Southern District of California and the Court of Appeals for the Ninth Circuit and the attorney of record herein for defendant Bun Bun Tran ("TRAN") and make this declaration in support of the motion to set aside the default of Leonel Arrellano.

3. Defendant Leonel Arrellano is an indigent illegal alien who does not speak, read or understand English. An interpreter had to be used to conduct his deposition.

4. As a result of the automobile accident with Arrellano, Tran filed a personal injury lawsuit against Arrellano, Chili's Restaurant and other third parties in San Diego Superior Court, Case number 37-2007-00065432-CU-PA-CTL, Department C-62, the Honorable Ronald L. Styn, Judge.

5. I have been negotiating with Randy Winet, Arrellano's State Action attorney for an assignment of Arrellano's bad faith rights against Progressive arising out of Progressive's failure to settle Tran's claim for Arrellano's policy limits.

6. As a defense to this action, if it is not dismissed, Tran would raise the fact that Progressive had the opportunity to settle this matter for the \$15,000 policy limits and refused.

7. Tran would present evidence in the form of letters to Progressive asking it to tender Arrellano's \$15,000 liability policy along with letters from Progressive wherein Progressive refused to tender Arrellano's policy limits.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 9, 2008, at Manhattan Beach California.

\_\_\_\_\_  
Christopher E. Angelo

**DECLARATION OF JOSEPH DI MONDA, ESQ,**

I, Joseph Di Monda, declare,

1. I am over the age of 18 years, I have personal knowledge of the facts stated herein and if called as a witness I would and could competently testify as follows;

2. I am an attorney at law duly admitted to practice before all the courts of the State of California, the United States District Court for the Southern District of California and the Court of Appeals for the Ninth Circuit and the attorney of record herein for defendant Bun Bun Tran ("TRAN") and make this declaration in support of the motion to set aside the Notice of Entry of Default of Leonel Arrellano.

3. On April 8, 2008, I spoke to Randy Winet of Winet, Patrick & Weaver. They represent Arrellano in the State Action.

4. Randy Winet told me that he is aware of this federal lawsuit for declaratory relief, and has requested that Progressive West Insurance Company pay him to defend Arrellano.

5. Randy Winet told me that Progressive has refused to pay for Arrellano's defense costs in this federal action.

6. Two days after Chili's Restaurant received Arrellano's Admissions, it filed a Motion for Summary judgment using Arrellano's Admissions as the basis for its arguments.

7. Exhibit 1 is a true and correct copy of the relevant pages of the Deposition Transcript of Leonel Arellano.

8. Exhibit 2 is a true and correct copy of Chili's Restaurant's Requests for Admissions (Set Two) Propounded upon Leonel Arrellano.

9. Exhibit 3 is a true and correct copy of Exhibit 3, Leonel Arrellano's Responses to Chili's Requests for Admissions, (Set Two)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 9, 2008, at Manhattan Beach California.

\_\_\_\_\_  
Joseph Di Monda

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA

3 COUNTY OF LOS ANGELES

4 I am a resident of the aforesaid county. I am over the age of eighteen years and not a  
5 party to the within action; my address is 1721 N. Sepulveda Blvd., Manhattan Beach,  
California 90266.

6 On **April 10, 2008**, I served the foregoing document(s) described as **NOTICE OF**  
7 **MOTION AND MOTION BY BUN TRANTO SET ASIDE ENTRY OF DEFAULT ON**  
8 **DEFENDANT LEONEL ARRELLANO: REQUEST TO APPOINT COUNSEL FOR**  
9 **ARRELLANO IN THIS MATTER; DECLARATION OF JOSEPH DI MONDA, ESQ.;**  
action, by placing the original/true copies thereof enclosed in a sealed envelope addressed as  
follows:

10 **SEE ATTACHED SERVICE LIST**

11 — I caused such envelope/package containing the document(s) to be delivered by hand  
12 to the offices of the addressee(s).

13 X The envelope was mailed with postage thereon fully prepaid. I am “readily” familiar  
14 with the firm’s practice of collection and processing correspondence for mailing. It is  
15 deposited with U.S. Postal Service on that same day in the ordinary course of business.  
I am aware that on motion of a party served, service is presumed invalid if the postal  
cancellation date or postage meter date is more than one day after date of deposit for  
mailing an affidavit.

16 — I deposited the above document(s) for facsimile transmission in accordance with the  
17 office practice of Angelo & Di Monda for collecting and processing facsimiles. I am  
18 familiar with the office practice of Angelo & Di Monda for collecting, processing, and  
transmitting facsimiles. The facsimile of the above document(s) was transmitted to the  
interested parties on the attached service list:

19 Executed on **April 10, 2008**, at Manhattan Beach, California.

20 I declare under penalty of perjury under the laws of the State of California that the  
21 above is true and correct.

22  
23 \_\_\_\_\_  
24 Karen L. Clark  
25  
26  
27  
28



Service List

ROBIE & MATTHAI  
James R. Robie  
500 South Grand Avenue  
15<sup>th</sup> Floor  
Los Angeles, CA 90071

S:\Legal Documents\Tran, Bun Bun v. Arrellano (traffic collision, brain damage)\Pleadings\Progressive v. Tran et al\Motion to Set Aside Entry of Default\Notice of Motion and Motion.wpd

000065



## **EXHIBIT 6**

**United States District Court**  
SOUTHERN DISTRICT OF CALIFORNIA

Progressive West Insurance Company

Plaintiff,

vs

Bun Bun Tran, et al.

Defendant,

Civil No. 07cv1999-JAH(POR)  
**DEFAULT**

It appears from the records in the above entitled action that Summons issued on the Original Complaint filed on 10/16/07 has been regularly served upon each of the Defendants hereinafter named; and it appears from the records herein that each of the Defendants has failed to plead or otherwise defend in said action as required by said Summons and provided by the Federal Rules of Civil Procedure. Now, therefore, the DEFAULT of each of the following Defendants is hereby entered.

Leonel Arrellano

**Entered On:**

W. SAMUEL HAMRICK, JR., CLERK

By:

s/J. Petersen

, Deputy

000066

# **EXHIBIT 7**

JAMES R. ROBIE, SBN 67303  
 KYLE KVETON, SBN 110805  
 RONALD P. FUNNELL, SBN 209897  
 ROBIE & MATTHAI  
 A Professional Corporation  
 500 South Grand Avenue, 15<sup>th</sup> Floor  
 Los Angeles, California 90071  
 (213) 706-8000 • (213) 624-2563 Fax  
[kkveton@romalaw.com](mailto:kkveton@romalaw.com)

Attorneys for Plaintiff PROGRESSIVE WEST  
 INSURANCE COMPANY

**UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA**

PROGRESSIVE WEST INSURANCE )  
 COMPANY, an Ohio corporation, )

Plaintiff, )

vs. )

BUN BUN TRAN, LEONEL  
 ARRELLANO, )

Defendants. )

**CASE NO. 07 - CV 1999 JAH (POR)**

**APPLICATION FOR DEFAULT  
 JUDGMENT BY COURT AGAINST  
 DEFENDANT LEONEL  
 ARRELLANO; DECLARATION OF  
 RONALD P. FUNNELL**

Date: June 2, 2008  
 Time: 2:30 p.m.  
 Ctrm: 11  
 940 Front Street  
 San Diego, CA 9210

**TO DEFENDANT LEONEL ARRELLANO AND HIS ATTORNEYS OF  
 RECORD:**

**PLEASE TAKE NOTICE THAT** on June 2, 2008, at 2:30 p.m. or as soon  
 thereafter as this matter may be considered by the above entitled Court, located at 940  
 Front Street, San Diego, California, Plaintiff Progressive West Insurance Company  
 ("Progressive") will present its application for a default judgment against defendant  
 Leonel Arrellano. The clerk has previously entered the default of said defendant on  
 April 9, 2008.

At this time Plaintiff requests the Court to enter a judgment of default based on  
 the Declaration of Ronald P. Funnell and the following matters:

1           1. Defendant Leonel Arrellano is not a minor or incompetent person or in  
2 military service or otherwise exempted under the Soldiers' and Sailors' Civil Relief  
3 Act of 1940; and

4           2. Defendant Leonel Arrellano was served with the summons and the  
5 complaint on November 17, 2007. Said defendant has not appeared in this action, nor  
6 answered the complaint.

7           3. Plaintiff is entitled to judgment against said defendant on account of the  
8 claims pleaded in the complaint, to wit:

9           Plaintiff Progressive insured Defendant Leonel Arrellano for the policy period  
10 May 30, 2006 to November 30, 2006 under California Motor Vehicle Policy number  
11 16558999-00. On November 18, 2006, Defendant Arrellano collided with Defendant  
12 Bun Bun Tran's automobile, causing Mr. Tran serious injuries from which he remains  
13 comatose.

14           Following the accident, Mr. Arrellano was arrested for driving under influence  
15 of alcohol, driving without a license and fleeing the scene of the accident. The  
16 accident report assigned fault to Mr. Arrellano. In June 2007, he was sentenced to 6  
17 years in a California prison.

18           On or about January 26, 2007, attorney Anh Quoc Duy Nguyen wrote  
19 Progressive demanding that Progressive tender its liability policy limits within fifteen  
20 (15) days. (A copy of Attorney Nguyen's demand letter is attached to the Funnell  
21 Declaration as **Exhibit 1**.)

22           Plaintiff is informed and believes that at the time Attorney Nguyen sent his  
23 January 26, 2007 letter, he was not legally representing Bun Bun Tran, but, instead,  
24 was representing Mr. Tran's mother. Plaintiff is further informed and believes that  
25 Mr. Tran's mother was not then guardian ad litem of Mr. Tran. As a result, Attorney  
26 Nguyen had no legal authority to settle the claims of Mr. Tran, nor did he have legal  
27 authority to release claims of Mr. Tran against any tortfeasor.

28           Attorney Nguyen's demand did not offer a release or dismissal in exchange for

1 payment of the insurance benefits, but was subject to the condition precedent “of  
2 convincing [Nguyen] there are no other responsible parties, whether insured or not,  
3 causing this accident. If I am not convinced, I will state as much in a letter and there  
4 will be no settlement.”

5 It was legally and factually impossible to convince Attorney Nguyen that there  
6 were no other responsible parties for causing this accident, given the facts and  
7 circumstances of the accident, and that Patricia Cole, in fact, paid Bun Bun Tran  
8 \$300,000 to settle the liability claim against her arising from this accident in July  
9 2007.

10 As a result of the above condition precedent, attorney Nguyen’s demand was  
11 not an offer to settle within the policy’s limits. Rather, the condition precedent of  
12 “convincing” Nguyen was outside of the policy and its stated limits.

13 Nevertheless, on February 2, 2007, Progressive sent a letter to Attorney  
14 Nguyen offering its policy limits, within 7 days of the demand. (A true and correct  
15 copy of this letter is attached to the Funnell Declaration as **Exhibit 2**). Attorney  
16 Nguyen rejected the offer and referred Mr. Tran’s claim to attorney Christopher  
17 Angelo.

18 On or about May 8, 2007, Attorney Angelo filed a lawsuit on behalf of Mr.  
19 Tran against Mr. Arrellano alleging causes of negligence and negligence per se  
20 regarding the above mentioned automobile accident. It is clear from the  
21 correspondence, discovery and pleadings filed in that case that Mr. Angelo intended  
22 to obtain a judgment against Mr. Arrellano and then sue Progressive for breach of  
23 contract and breach of covenant of good faith and fair dealing for failing to settle Mr.  
24 Tran’s claim within policy limits.

25 4. Plaintiff Progressive is entitled to a declaratory judgment against  
26 defendant Arrellano stating the following rights and duties of the parties under the  
27 involved policy of insurance:

28 That in handling Leonel Arrellano’s claim arising from the November 18, 2006

1 motor vehicle accident, Progressive has discharged its obligations under the insurance  
2 policy and in accord with California law; and that its conduct in response to the  
3 January 26, 2007 letter from Attorney Nguyen was reasonable, was not in bad faith,  
4 and did not eliminate or jeopardize the \$15,000 policy limits available under the  
5 Progressive California Motor Vehicle Policy number 16558999-00 issued to insured  
6 defendant Leonel Arrellano.

7 The above stated facts are set forth in the accompanying declaration of Ronald  
8 P. Funnell, filed herewith.

9  
10 DATED: April\_\_\_\_, 2008

ROBIE & MATTHAI  
A Professional Corporation

11  
12  
13 By: \_\_\_\_\_

JAMES R. ROBIE  
KYLE KVETON  
RONALD P. FUNNELL  
Attorneys for Plaintiff PROGRESSIVE WEST  
INSURANCE COMPANY

**DECLARATION OF RONALD P. FUNNELL IN SUPPORT**  
**OF REQUEST TO ENTER DEFAULT JUDGMENT**

I, Ronald P. Funnell, declare as follows:

1. I am over 18 years old and am an attorney licensed to practice law in the state of California and am an attorney with the law firm of Robie and Matthai, attorneys representing Plaintiff Progressive West Insurance Company in this case. The facts stated in this declaration are from my own personal knowledge and I would and could testify competently to these facts if called to do so.

2. Defendant Leonel Arrellano was served with the Summons and the Complaint on November 17, 2007.

3. Defendant Leonel Arrellano has not appeared in this action and has not responded to the complaint within the 20-day time period provided by FRCP 12(a)(1).

4. Defendant Leonel Arrellano is not a minor nor an incompetent person.

5. Defendant Leonel Arrellano is not a member of the military or otherwise exempted under the Soldiers' and Sailors' Civil Relief Act of 1940.

6. Defendant Leonel Arrellano would not be able to attend any hearing regarding this matter because he is presently incarcerated at Sierra Conservation Center, 5100 O'Byrnes Ferry Road, Jamestown, CA. Mr. Arrellano is not represented by counsel in this action.

7. On or about January 26, 2007, attorney Anh Quoc Duy Nguyen wrote to Progressive demanding that Progressive pay its \$15,000 policy limits within 15 days. A true and correct copy of Nguyen's letter is attached as **Exhibit 1**.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this \_\_\_\_\_ day of April 2007, at Los Angeles, California.

RONALD P. FUNNELL

1 **PROOF OF SERVICE**

2 I declare that I am over the age of eighteen (18) and not a party to this action.  
 3 My business address is 500 South Grand Avenue, 15th Floor, Los Angeles, CA 90071-2609.

4 On April 23, 2008, I served the foregoing document(s) described as:

5 **APPLICATION FOR DEFAULT JUDGMENT BY**  
 6 **COURT AGAINST DEFENDANT LEONEL**  
 7 **ARRELLANO; DECLARATION OF RONALD P.**  
 8 **FUNNELL**

9 on all interested parties in this action by placing a true copy of each document,  
 8 enclosed in a sealed envelope addressed as follows:

9 **Attorneys for Defendant, Bun Bun**  
 10 **Tran:**

10 Christopher E. Angelo, Esq.  
 11 Joseph Di Monda, Esq.  
 12 ANGELO & DI MONDA LLP  
 13 1721 No. Sepulveda Boulevard  
 14 Manhattan Beach, CA 90266-5014  
 15 Telephone: (310) 939-0099  
 16 Facsimile: (310) 939-0023

9 **Defendant Leonel Arrellano, In Pro**  
 10 **Per:**

10 Leonel Arrellano, Inmate #F77654  
 11 c/o Division of Adult Operations  
 12 Sierra Conservation Center  
 13 5100 O'Byrnes Ferry Road  
 14 Jamestown, CA 95327

14 (X) **BY MAIL:** as follows: I am "readily familiar" with the firm's practice of  
 15 collection and processing of correspondence for mailing with the United States  
 16 Postal Service. I know that the correspondence was deposited with the United  
 17 States Postal Service on the same day this declaration was executed in the  
 18 ordinary course of business. I know that the envelope was sealed and, with  
 19 postage thereon fully prepaid, placed for collection and mailing on this date in  
 20 the United States mail at Los Angeles, California.

18 (X) **BY E-SERVICE:** I caused the above-referenced document(s) to be  
 19 electronically served on all counsel of record through the Court's CM/ECF  
 20 filing and service system.

21 (X) **(Federal)** I declare that I am employed in the office of a member of the bar  
 22 of this court at whose direction the service was made.

23 Executed on April 23, 2008, at Los Angeles, California.

24 \_\_\_\_\_  
 25 Windy Gale Tyler  
 26  
 27  
 28

01/20/2007 FRI 07:20 FAX 11143 0091 ANH DUY NGUYEN & ASSOC

01/20/2007

LAW OFFICES OF  
ANH QUOC DUY NGUYEN & ASSOCIATES

Branch Offices:

SAN GABRIEL  
1015 E. LAS TUNAS DRIVE  
SAN GABRIEL, CA 91778  
PHONE: (626) 286-2239

SAN DIEGO  
4745 EL CAJON BLVD., SUITE 101  
SAN DIEGO, CA 92126  
PHONE: (619) 284-0800

15622 BROOKHURST STREET  
WESTMINSTER, CALIFORNIA 92683

PHONE: (714) 531-8181  
FAX: (714) 531-9397

RESPOND TO:

■ WESTMINSTER OFFICE

□ SAN GABRIEL OFFICE

□ SAN DIEGO

January 26, 2007

Case 3:07-cv-01999-JAH-POR Document 12-2 Filed 04/23/2008 Page 1 of

Tiara Foster, Claims Representative  
Progressive Insurance Company  
6131 Orangethorpe Avenue, Suite 300  
Buena Park, CA 90620  
714.736.6300 general phone  
714.736.6321 direct  
714.736.6308 fax

Via Certified Mail with Return Receipt  
and Fax to: (714)736-6308

Re: My Client:  
Your Insured/Defendant:  
Date of Accident:  
Your Claim No.:

Bun Bun Tran  
Leonel Arrellano  
November 18, 2006  
060409287

Dear Ms. Foster:

Please be advised that I represent Bun Bun Tran, who was seriously injured because of your insured running a stop sign. Thereafter, your insured fled from the scene. He has been arrested and is currently awaiting a criminal hearing in February of this year. My client has been hospitalized at UC San Diego, Floor 8 East, Room 812A, in a comatose condition since November 18, 2006. I understand that you have learned about his condition and the facts behind this accident from Esurance, the auto insurance company of Bun Bun Tran. You therefore know that the medical expenses are approaching \$700,000 and Progressive has insufficient amounts of liability insurance.

My client is represented by his mother/guardian, Le Thi Nguyen. My client is hereby willing to be responsible for any and all medical and other liens so long as Progressive tenders all of its liability limits within 15 days from the date of this letter subject to the further condition precedent of convincing me that there are no other responsible parties, whether insured or not, causing this accident. If I am convinced, I will state as much in a letter. If I am not convinced, I will never state as much in a letter and there will be no settlement. Please also tell me, since it may bear on settlement, whether or not your insured received liquor at a Chili's restaurant shortly before the accident, and if so, which Chili's restaurant. We understand that Chili's was your insured's employer at the time of the accident.

Very truly yours,

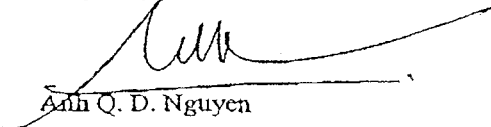
  
Anh Q. D. Nguyen

EXHIBIT 1

000074

Claims Office  
6131 Orangethorpe Ave. Ste 300  
Buena Park, CA 90620  
Telephone: 714-736-6300  
Facsimile: 714-736-6308

Underwritten by: **Progressive West Insurance  
Company**

Claim number: 060409287  
Date of loss: 11/18/2006  
Today's date: 02/02/2007

Sent again on 4-5-07

Law Offices Of Anh Q.D. Nguyen & Assoc

Attn: Anh Nguyen  
15622 Brookhurst Street  
Westminster, CA 92683

Case 3:07-cv-01999-JAH-POR Document 12-2 Filed 04/23/2008 Page 2 of

Your Client: Bun Bun Tran

Dear Mr. Nguyen:

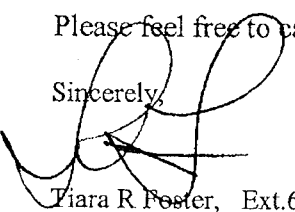
This will confirm our offer of \$15000 to settle your client's claim. Please be advised that this offer represents the policy limit. For your review, we have enclosed a copy of the declaration page.

You requested information regarding our insured's relationship with Chili's Restaurant and if he was served alcohol at this location. Unfortunately, we have not been able to locate our insured; therefore, we do not have a recorded statement from our insured regarding the facts of this loss.

Please convey this offer to your client(s) and advise me of the decision at your earliest convenience.

Please feel free to call with any questions or concerns.

Sincerely,



Tiara R Foster, Ext.6321  
Claims Specialist

tiara\_r\_foster@progressive.com

TXF/uf

## **EXHIBIT 8**

United States District Court  
SOUTHERN DISTRICT OF CALIFORNIA

Progressive West Insurance Compan

V.

JUDGMENT IN A CIVIL CASE

Bun Bun Tran, Leonel Arrellano

CASE NUMBER: 07CV1999-JAH(POR)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the instant complaint is dismissed without prejudice in its entirety for lack of subject matter jurisdiction.

April 29, 2008

Date

W. Samuel Hamrick, Jr.

Clerk

s/J. Petersen

(By) Deputy Clerk

ENTERED ON April 29, 2008

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6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 PROGRESSIVE WEST INSURANCE  
11 COMPANY, an Ohio corporation,

12 Plaintiff,

13 v.

14 BUN BUN TRAN, LEONEL  
15 ARRELLANO,

Defendants.

Civil No. 07cv1999 JAH(POR)

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION  
[DOCS. # 4, 5]

16 INTRODUCTION

17 Now pending before the Court is the motion filed by defendant Bun Bun Tran  
18 ("defendant" or "Tran") to dismiss the instant complaint for lack of subject matter  
19 jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The  
20 motion has been fully briefed by the parties. After a careful consideration of the pleadings  
21 and relevant exhibits submitted by the parties, and for the reasons set forth below, this  
22 Court GRANTS defendant's motion to dismiss for lack of subject matter jurisdiction and  
23 DISMISSES the instant complaint without prejudice in its entirety.

24 BACKGROUND

25 This case stems from a catastrophic automobile accident that occurred on  
26 November 18, 2006, between Tran and defendant Leonel Arrellano ("Arrellano"). Compl.  
27 ¶ 7. Plaintiff Progressive West Insurance Company ("plaintiff" or "Progressive") insured  
28 Arrellano under an automobile policy with a bodily injury liability limit of \$15,000. Id.

¶ 6. Arrellano was the driver of a vehicle that collided with Tran's vehicle causing serious head injuries to Tran leaving him comatose. *Id.* ¶¶ 9, 10. Arrellano, later found to be at fault, was subsequently arrested for driving under the influence of alcohol, driving without a license and leaving the scene of an accident. *Id.* ¶ 12. After a guilty plea, Arrellano was sentenced to six years custody. *Id.* Tran, through his guardian *ad litem*, filed a complaint in the San Diego County Superior Court on May 8, 2007, alleging causes of action for negligence and negligence *per se* against Arrellano, Patricia Cole, Chili's Restaurants and the City of San Diego. *Id.* ¶ 19; Di Monda Decl. ¶ 7. Progressive is not a party to the state court suit.

Progressive filed the instant complaint in this Court on October 16, 2007, seeking declaratory relief pursuant to the Declaratory Judgment Act, *see* 28 U.S.C. § 2201, in the form of a declaration as to the respective rights and duties of the parties involved under the automobile insurance policy issued to Arrellano. Defendant filed the instant motion to dismiss on November 28, 2007 and an amended motion on November 30, 2007. *See* Docs. # 4, 5. Progressive's opposition to the motion was filed on December 27, 2007. Doc. # 6. Defendant's reply brief was filed on January 2, 2008. This Court subsequently took the motion under submission without oral argument. *See* CivLR 7.1(d.1).

### DISCUSSION

Defendant moves to dismiss the instant complaint in its entirety for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that plaintiff cannot meet the \$75,000 jurisdictional threshold for diversity jurisdiction.<sup>1</sup> *See* Doc. # 5 at 5.

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<sup>1</sup> Although defendant also initially moves to dismiss on the grounds that the issues presented are not ripe for review because there has not been any determination of damages owed by any party, *see* Doc. # 5 at 4, plaintiff correctly points out that the Declaratory Judgment Act "allows adjudication of the parties' rights and obligations on a matter in dispute regardless of whether claims for damages or injunctive relief have yet arisen." Doc. # 6 at 2-3. In reply, defendant does not appear to disagree with plaintiff's position, but instead focuses on his arguments concerning the jurisdictional amount in controversy. *See* Doc. # 7. However, because this Court ultimately finds that subject matter jurisdiction is lacking, this Court does not reach this issue.



1     **1.     Legal Standard**

2           The federal court is one of limited jurisdiction. *See Gould v. Mutual Life Ins. Co.*  
3 *v. New York*, 790 F.2d 769, 774 (9th Cir. 1986). As such, it cannot reach the merits of  
4 any dispute until it confirms its own subject matter jurisdiction. *Steel Co. v. Citizens for*  
5 *a Better Environ.*, 118 S.Ct. 1003, 1012 (1998). “Jurisdiction is power to declare the law,  
6 and when it ceases to exist, the only function remaining to the court is that of announcing  
7 the fact and dismissing the cause.” *Id.* (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.)  
8 506, 614 (1868)). Under Rule 12(b)(1), a defendant may seek to dismiss a complaint for  
9 “lack of jurisdiction over the subject matter.” Fed. R. Civ. P. 12(b)(1). When considering  
10 a Rule 12(b)(1) motion to dismiss, the district court “is free to hear evidence regarding  
11 jurisdiction and to rule on that issue prior to trial, resolving factual disputes where  
12 necessary.” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). “In such  
13 circumstances, ‘[n]o presumptive truthfulness attaches to plaintiff’s allegations, and the  
14 existence of disputed facts will not preclude the trial court from evaluating for itself the  
15 merits of jurisdictional claims.” *Id.* (quoting *Thornhill Publishing Co. v. General*  
16 *Telephone & Electronic Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). Plaintiff, as the party  
17 seeking to invoke jurisdiction, has the burden of establishing that jurisdiction exists. *See*  
18 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

19           “[T]he Declaratory Judgment Act is not a jurisdictional statute” and “does not create  
20 subject matter jurisdiction where none otherwise exists.” *Jarrett v. Resor*, 426 F.2d 213,  
21 216 (9th Cir. 1970). Thus, the basis for federal jurisdiction in a declaratory relief action  
22 must be independent of the Declaratory Relief Act. *See Stock West, Inc. v. Confederated*  
23 *Tribes of Colville Reservations*, 873 F.2d 1221, 1225 (9th Cir. 1989). Here, plaintiff  
24 alleges jurisdiction based solely on diversity. *See* Compl. ¶ 4. To establish diversity  
25 jurisdiction, there must be: (1) complete diversity among opposing parties; and (2) an  
26 amount in controversy exceeding \$75,000. *See* 28 U.S.C. § 1332(a). In declaratory relief  
27 actions, “the amount in controversy is measured by the value of the object of the  
28 litigation” and dismissal is appropriate only if it appears to a “legal certainty” that the

jurisdictional amount is not met. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 346-48 (1977); Cohn v. Petsmart, Inc., 282 F.3d 837, 840 (9th Cir. 2002). It is well settled that the amount in controversy is determined at the time the complaint is filed. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

## 2. Analysis

In support of his contention that the jurisdictional amount in controversy has not been met, defendant points out that the \$75,000 diversity jurisdiction threshold exceeds Progressive's contractual liability under the \$15,000 policy issued to Arrellano. Doc. # 5 at 5. Defendant argues that plaintiff seeks to improperly include its potential liability in the amount in controversy calculation. Id. at 5-6. Thus, defendant contends that any liability above Progressive's \$15,000 policy limits is too speculative and, therefore, plaintiff "cannot show to a legal certainty what its financial exposure may be when the lawsuit is adjudicated." Id. at 6.

Plaintiff contends that the jurisdictional threshold has been met here because there is a potential for liability well exceeding \$75,000. *See* Doc. # 6 at 7. Plaintiff claims that Tran's underlying claim against Arrellano, which was valued in excess of \$700,000 as of January 26, 2007 and is expected to "reach tens of millions of dollars," id. at 8 (quoting Doc. # 5 at 3), is the proper measure of the jurisdictional amount in controversy because that amount is Progressive's potential liability in Tran's future claim against it.<sup>2</sup> Id. Plaintiff explains that the purpose of the instant lawsuit is simply to obtain a determination as to whether a letter sent by Tran's counsel to Progressive constitutes a "legally cognizable 'policy limits demand.'" Id. at 9. According to plaintiff, if the letter is found not to be such a demand, then plaintiff's "indemnity obligation [will] still [bc] defined by the stated \$15,000 limits under the policy." Id.


This Court is unconvinced that inclusion of potential liability based on a possible

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<sup>2</sup> Plaintiff's complaint alleges that Tran's attorney "intends to obtain a judgment against Mr. Arrellano and then sue Progressive on behalf of Mr. Tran for breach of contract and breach of the implied covenant of good faith and fair dealing for failure to settle Mr. Tran's claim within policy limits" and "has accused Progressive of misconduct and claims Progressive's failure to accept [the] January 26, 2007 policy limits demand has eliminated the stated limits of the policy." Compl. ¶¶ 20, 21.

1 future lawsuit that may or may not be filed by Tran's counsel is an appropriate measure  
2 of the amount in controversy for diversity jurisdiction to exist here. At the time the  
3 instant lawsuit was filed, Progressive's liability under the policy issued to Arrellano was  
4 capped at the policy limits of \$15,000. In fact, the relief plaintiff is seeking in the instant  
5 complaint is a declaration that its liability is also capped at that amount. This Court finds  
6 that plaintiff cannot meet its burden of demonstrating that the amount in controversy in  
7 this case exceeds the \$75,000 threshold required at the time the lawsuit was filed because  
8 the policy at bar limits liability to \$15,000 and there is only a potential that Progressive's  
9 liability might exceed that limit. *See Kokkonen*, 511 U.S. at 377. Therefore, this Court  
10 finds dismissal is appropriate because it appears to a "legal certainty" that the  
11 jurisdictional amount cannot be met. *Hunt*, 432 U.S. at 346-48. Accordingly,  
12 defendant's motion to dismiss for lack of subject matter jurisdiction [docs. # 4, 5] is  
13 **GRANTED** and the instant complaint is **DISMISSED WITHOUT PREJUDICE** in its  
14 entirety for lack of subject matter jurisdiction.

15  
16 Dated: April 28, 2008

17   
18 JOHN A. HOUSTON  
19 United States District Judge  
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22  
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27  
28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA

3 COUNTY OF LOS ANGELES

4 I am a resident of the aforesaid county. I am over the age of eighteen years and not a  
5 party to the within action; my address is 1721 N. Sepulveda Blvd., Manhattan Beach,  
California 90266.

6 On May 13, 2008, I served the foregoing document(s) described as **DEFENDANT**  
7 **BUN TRAN'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF HIS MOTION**  
8 **FOR SANCTIONS** on the interested parties in this action, by placing the original/true  
copies thereof enclosed in a sealed envelope addressed as follows:

9 **SEE ATTACHED SERVICE LIST**

10 — I caused such envelope/package containing the document(s) to be delivered by hand  
to the offices of the addressee(s).

11 X The envelope was mailed with postage thereon fully prepaid. I am "readily" familiar  
12 with the firm's practice of collection and processing correspondence for mailing. It  
13 is deposited with U.S. Postal Service on that same day in the ordinary course of  
business. I am aware that on motion of a party served, service is presumed invalid if  
14 the postal cancellation date or postage meter date is more than one day after date of  
deposit for mailing an affidavit.

15 — I deposited the above document(s) for facsimile transmission in accordance with the  
office practice of Angelo & Di Monda for collecting and processing facsimiles. I am  
16 familiar with the office practice of Angelo & Di Monda for collecting, processing,  
and transmitting facsimiles. The facsimile of the above document(s) was transmitted  
17 to the interested parties on the attached service list:

18 Executed on May 12, 2008, at Manhattan Beach, California.

19 I declare under penalty of perjury under the laws of the State of California that the  
above is true and correct.

20  
21 S/Joseph Di Monda  
22 Joseph Di Monda  
23  
24  
25  
26  
27  
28

Service List

James Robbie  
ROBIE & MATTHAI  
James R. Robie  
500 South Grand Avenue  
15<sup>th</sup> Floor  
Los Angeles, CA 90071